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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Monday,
March 30, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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I-N-D-E-X

WITNESSDIRECT CROSS REDIRECT RECROSS**Peter Downey**

By Mr. Rich 1958

By Mr. Schaeffer 2006

ASCAP

<u>Exhibit No</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
1X	<u>Current</u>	2010	2032
2X	Exhibit 516.14	2029	2049
3X	PBS Website printout	2049	2053
4X	Guidelines	2060	2062
5X	<u>Electronic Media</u>	2086	
6X	Web Pages	2097	
7X	713.55	2137	
8X	<u>Current</u>	2138	
9X	Article	2143	
10X	Article: Boston Herald	2157	
11X	<u>Current</u> 08-14-97	2166	
12X	PB Report 03-21-97	2170	
13X	Article	2175	
14X	PB 1997 Annual Report	2181	2184
15X	PBS Website	2185	2206
16X	Article	2191	
17X	Letter from PBS to Congress	2205	2206

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P-R-O-C-E-E-D-I-N-G-S

(10:08 a.m.)

CHAIRPERSON GRIFFITH: Ladies and gentlemen, good morning. Let the record reflect please, that the court reporter has been previously sworn and remains under oath.

We apologize for being five minutes late. We blame Metro, Amtrak. However, we'll stay five minutes late to make up for it.

Mr. Rich, I believe we're ready, are we?

MR. RICH: We are, indeed.

CHAIRPERSON GRIFFITH: There are several pending things we just want to bring to your attention before we start. We have not yet received the written withdrawal of the motion concerning the motion to strike portions of Dr. Boyle's testimony.

And at some time we would like to hear about the negotiation and progress you've been making with respect to the Grajeda documents, and maybe it was Iossa, some of those --

MR. SCHAEFFER: No, just Grajeda.

CHAIRPERSON GRIFFITH: Just Grajeda, okay.

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1 And we understand that your response to the latest
2 request which has been filed by the Public
3 Broadcasters is due tomorrow.

4 MR. SCHAEFFER: That's correct.

5 CHAIRPERSON GRIFFITH: And we'll hear any
6 brief arguments if necessary, on that on Thursday
7 morning.

8 MR. SCHAEFFER: Very well.

9 CHAIRPERSON GRIFFITH: All right, with
10 that in mind then, Mr. Rich if you're ready to proceed
11 with the Public Broadcasters' direct case.

12 MR. RICH: We are. Thank you very much.
13 We would call as our first witness, Peter Downey.

14 CHAIRPERSON GRIFFITH: All right. Good
15 morning. Mr. Downey, if you will raise your right
16 hand to be sworn please, sir?

17 WHEREUPON,

18 PETER DOWNEY
19 was called as a witness by Counsel for Public
20 Broadcasters and, having been first duly sworn,
21 assumed the witness stand, was examined and testified
22 as follows:

DIRECT EXAMINATION

BY MR. RICH:

Q Mr. Downey, would you please state your name for the record?

A My name is M, as in Michael, Peter Downey.

Q By whom are you employed?

A Public Broadcasting Service.

Q What is your current position at PBS?

A Senior vice president of Business Affairs. And that encompasses two or three different tasks. One is negotiating production contracts with producers from whom we acquire programming. A second is supervising the administration of the PBS underwriting guidelines.

Q How long have you held your current position?

A Since -- approximately 14 years.

Q And prior to your current position, did you have prior responsibilities at PBS?

A Yes.

Q Could you briefly describe those?

A Well, I joined PBS in 1977 and was brought

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1 in to supervise the transition from terrestrial
2 distribution via AT&T to satellite distribution by
3 Westar satellite. And then gradually undertook
4 different tasks and responsibilities, and now am
5 responsible for those I outlined.

6 Essentially, in the larger concept it's
7 supervising what I'll call non-editorial policies at
8 PBS. The Programming Department takes care of the
9 editorial and my group takes care of the, sort of
10 business and other policies.

11 Q And prior to joining PBS in 1977, were you
12 previously employed in public broadcasting?

13 A Yes, from 1963 until 1977 I worked for
14 WGBH in Boston in a variety -- essentially a variety
15 of production tasks.

16 Q Could you very briefly, by way of
17 overview, Mr. Downey, summarize the main points you
18 came to establish in your written testimony, and then
19 we'll cover those a bit more fully?

20 A I think the main point I was trying to get
21 across in my testimony is that, certainly over the
22 last five years or so, the operations of the amount of

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1 programming, the funds available to PBS, have all
2 remained essentially flat. We have not experienced
3 the kind of growth we did in the '70s, for example.

4 These have been in some respects,
5 difficult times, as I'm sure you may be aware. It's
6 only three years ago this time that the Speaker of the
7 House threatened to zero out public broadcasting, and
8 so we are under continuing pressure just to try to
9 stay even. And we've succeeded at staying even but
10 that's the best we've been able to do

11 Q Do you draw any conclusions in your
12 testimony as to the degree to which significant
13 increases in music performing rights licensed payments
14 would be appropriate in the environment you describe?

15 A It strikes me that there's a tremendous
16 disparity between what's been sought on behalf of the
17 ASCAP and BMI, and what's logical or rational given
18 the kind of -- and level of activity that broadcasting
19 or public television certainly, has been engaged in
20 over these past five years.

21 There's just no -- I don't understand the
22 reason or the rationale or the logic behind the kind

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1 of increase that's been recommended or proposed.

2 Q What is the overall mission of public
3 television?

4 A Essentially to serve the public. To use
5 the resources at our command to provide programs and
6 information that benefits the viewer.

7 Q Through what programming initiatives, in
8 your experience, does public television seek to
9 achieve this objective?

10 A This is, in some level or other, it's true
11 of every program we provide. But for example, one of
12 our major initiatives is in the area of children's
13 programming.

14 We have what's called a ready-to-learn
15 initiative, and present perhaps about a dozen
16 different, children's programs -- like Sesame Street
17 and Mr. Rogers' Neighborhood and Wishbone and Barney,
18 and a new series premiering this week called
19 Teletubbies -- all of which are intended to enable
20 children to learn basic learning skills and coping
21 skills.

22 And all of this is packaged in what's

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1 called the ready-to-learn program which, through
2 outreach, through you know, services provided by local
3 stations in their communities, seeks through
4 caregivers and through learning centers and what-have-
5 you, to enrich or to extend the value of the programs
6 through what's called mediated learning.

7 In other words, having an adult caregiver
8 work with the child to understand the lessons that are
9 being taught. These are the kinds of services, the
10 kinds of educational and social benefits that we try
11 to provide through public television.

12 Q To what degree in your experience, is it
13 the function of public television to replicate
14 commercial television program offerings, as opposed to
15 provide alternatives?

16 A There's -- I mean, they're, in my mind,
17 completely different undertakings.

18 The purpose of commercial television is to
19 gather in front of the screen the maximum number of
20 viewers for the purpose of selling advertising. The
21 purpose of public television lies in the program
22 itself, rather than the number of people gathered to

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1 view it.

2 While we're delighted when large numbers
3 of people watch the programs we produce for mission
4 reasons, our purpose, again, is not to reach large
5 numbers of viewers or to compete on that playing
6 field. The purpose instead is to ensure that the
7 program itself provides the service or the information
8 -- the program itself is the end product, again, not
9 however many people may watch it.

10 Q You have next to you an exhibit book
11 reflecting the Public Broadcasting Exhibits. Your
12 Honors has a set of also. Could I ask you to turn to
13 tab 8 which is Exhibit PB-8, if you would? And
14 flipping through those, could you describe for the
15 panel illustratively, certain of the programming
16 initiatives of PBS that reflect the mission that you
17 have just testified to?

18 A Well, it's -- when people think of public
19 television they often think of a short list of
20 programs that they may watch from time to time. For
21 example, the News Hour with Jim Lehrer, or Frontline,
22 or NOVA.

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1 But the truth of the matter is that there
2 is an enormous number of activities that go on -- some
3 of which are reflected on the television screen, some
4 of which are not -- but all of which are part of the
5 services that PBS and its stations provide.

6 In tab 8 you'll see, just from skipping
7 through, we have an adult learning service, for
8 example, which has enabled since its creation, some
9 three million individuals to obtain college credit
10 through televised credit courses in conjunction with
11 their local public television station.

12 The Business Channel is a new undertaking
13 of PBS -- and its objective ultimately, hasn't been
14 achieved yet -- is to provide professional
15 development, professional education to be delivered to
16 the desktop using computer and Internet activities.

17 Now, this is something again, you won't
18 see a TV program on your local, public television
19 station, but this is an area where we can apply our
20 expertise in education and telecommunications to
21 provide an educational service to professionals.

22 Electronic field trips are another example

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1 of an activity where, by using a small crew and a
2 camera, we can take students on a field trip to a
3 place that is important to their particular studies
4 and relay that information, either by television or by
5 the Internet.

6 In the area of instructional television
7 many of our stations are actually owned by local,
8 public school systems and use the television
9 technology to deliver televised courses for students
10 from kindergarten through 12th grade.

11 Turning the page, here are some more
12 services for teachers.

13 Q I take it on the second page is the ready-
14 to-learn service you described a bit earlier?

15 A Yes. In the upper right-hand corner they
16 are, and under it, PBS video which is the means by
17 which we can make PBS programs available to the viewer
18 for their own pleasure in viewing after-the-fact, but
19 by the video.

20 Turning several pages to the page headed,
21 "Teacher Publications", there's a very extensive print
22 component of providing curriculum-based materials to

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1 teachers in support of various subjects, in support of
2 public television programs, and again, making this
3 available nationwide.

4 Q Thank you. And turning briefly to tab 2
5 of these materials, PB Exhibit 2, is a list I take it,
6 of certain awards which PBS programming has garnered
7 in recent years, is that correct?

8 A That is correct.

9 Q Is there anything about the nature of the
10 programs cited there that you think illustrates the
11 unusual qualities of public television?

12 A Well, I think that -- first of all, these
13 are awards from organizations that we think of,
14 anyway, are the most prestigious. And each of these
15 programs I think, is noteworthy for its quality, for
16 the quality of the content of the information it
17 provides to the viewer; whether it be children's
18 programs such as Sesame Street -- which is mentioned
19 so many times here -- to programs like Frontline and
20 National Geographic, and so on.

21 Q Let's talk a little bit about PBS itself.
22 What functions does PBS perform in the public

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1 broadcasting system?

2 A Essentially, PBS is a program distributor.
3 PBS doesn't produce anything itself. It acquires
4 programs from independent producers, from its member
5 stations; organizes them into a program schedule; and
6 then distributes those programs out to the stations
7 via satellite.

8 Q And who are the member stations? Who do
9 they comprise?

10 A There are about 175 organizations or
11 entities who are licensed by the Federal
12 Communications Commission to operate one or more
13 television transmitters. In all, those 175 operate
14 about 350 TV transmitters. Each of those 175 is a
15 member of PBS. It pays an assessment -- annual
16 assessment to PBS for distribution services and also
17 provides to PBS funds with which PBS acquires those
18 programs.

19 Q Are there one or more non-commercial,
20 educational television stations which are not PBS
21 members?

22 A Yes, I believe there are about five

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1 stations that are not PBS members but are non-
2 commercial, educational television licensees.

3 Q And do you have an understanding whether
4 those five, together with the PBS member stations,
5 comprise the entities for whom fees are being set in
6 this proceeding?

7 A My understanding is that all stations
8 eligible to receive funds from CPB are being
9 represented by PBS and CPB.

10 Q And if you would look at PB Exhibit 1 in
11 the exhibit book, am I correct that listed there is a
12 group, at least as of the date of the commencement of
13 this proceeding, in or about October 1st of CPB-
14 eligible public television stations who are to be the
15 beneficiaries of the outcome of this proceeding?

16 A Yes. This is a list, as far as I can
17 tell, of all of the stations eligible to be covered
18 here. There are large ones, small ones, state
19 networks, major market stations, small rural stations.
20 They come in all shapes and sizes.

21 Q I think that answer more or less answers
22 what was to be my next question which is, there's been

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1 a lot of testimony reflecting the economic
2 circumstances, programming circumstances, underwriting
3 circumstances of entities such as WNET and WGBH and
4 certain of the other very large stations.

5 Q How representative of the universe of
6 public television stations are those entities?

7 A Suggesting WNET is representative is like
8 suggesting New York City is a typical American town.
9 There are wide, wide variations. WNET's operating
10 budget is somewhere in excess of \$100 million. But
11 there are a dozen, or as many as 20 stations who have
12 operating budgets of less than a million dollars,
13 staffing levels of a dozen or 15.

14 By-and-large, the great majority of
15 stations are stations with budgets of less than \$10
16 million, fewer than 50 employees. By contrast WNET,
17 WGBH, and one or two other major market stations,
18 because of the significant role they play in
19 television production, are in a class all by
20 themselves and are much larger because of that.

21 But again, they hardly represent the
22 mainstream, or are they in any sense "typical" of the

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1 average public television station.

2 Q What is the federal regulatory framework
3 in which the non-commercial, educational broadcast
4 television stations operate?

5 A They are all regulated by the Federal
6 Communications Commission. Non-commercial educational
7 television stations operate under a sort of separate
8 body of regulations. Some regulations apply uniformly
9 to all television stations, but there's quite a large
10 body of regulatory apparatus that applies only to non-
11 commercial, educational television because it's so
12 very different from commercial television.

13 Q And what would an example or two be of the
14 special areas of regulation?

15 A Well, of course fees -- the non-commercial
16 stations pay lesser fees, and there's for example, a
17 great deal of --

18 MR. KLEINBERG: I'm sorry, I can't hear
19 the witness.

20 MR. RICH: Would you keep your voice up a
21 little bit?

22 THE WITNESS: Sure. I was saying one

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1 difference is that there's a separate schedule of fees
2 for non-commercial television stations, but I think --
3 and another area where there's quite a different body
4 of regulation has to do with things like underwriting
5 guidelines.

6 Public television -- well, all television
7 stations are required to disclose who may have paid
8 for a program, but there's a whole additional set of
9 guidelines that apply to public television stations
10 because in the course of announcing who may have paid
11 for a program, this can arguably perhaps, lapse over
12 into an advertisement, which would be impermissible.

13 And so there are guidelines or
14 instructions from the FCC saying what you can and
15 can't do on public television, so as to prevent a
16 public television station from broadcasting an
17 advertisement.

18 Q How do the economics -- this is a broad
19 question but it's deliberately broad -- how do the
20 economics of public television compare to that of
21 commercial television to your knowledge and in your
22 experience?

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1 A Well, they're very different. The
2 essential economic model that commercial television
3 represents, as I said a moment ago, is to attract the
4 largest number of viewers to the screen at any
5 particular time, and then to in effect, sell those
6 viewers off in lots of 1,000 to an advertiser.

7 So an advertiser pays a cost-per-thousand
8 rate to have that advertiser's message exposed to this
9 group of viewers. That is the sort of simple
10 transaction, and that's where essentially, all the
11 revenue comes from on the commercial side.

12 On the public television side there's just
13 no counterpart to that. Instead, public television's
14 struggle is to raise funds from a whole variety of
15 different sources -- not through advertising but
16 through grants from the Federal Government, from
17 individual contributions, from viewers like yourself,
18 from state government, from local government, from
19 corporations -- either in the form of underwriting
20 grants or, you know, straightforward charitable
21 contributions.

22 There are manifold sources of revenue, and

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1 because life in public television is a constant
2 struggle in terms of raising funds, we have, you know,
3 attempted to plumb every possible line of support and
4 think of all different kinds of ways of raising funds.

5 So the sources of revenue are widespread
6 and numerous, but all essentially are in support of
7 the non-commercial mission of public television.

8 Q Do you have a copy of your written, direct
9 testimony in front of you?

10 A Yes.

11 Q If you would turn to page 11, please?
12 There are a series of pie charts there.

13 A Yes.

14 Q I take it those reflect the -- as of FY96
15 -- the diversity of funding sources that you just
16 testified to, is that correct?

17 A Yes, this represents essentially, all the
18 sources of revenue for public television as gathered
19 by the Corporation for Public Broadcasting. The
20 information was gathered by them.

21 Q Am I correct viewing this, that the
22 largest, single contributor of funding is -- at least

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1 for these categories -- is membership at 23 percent?

2 A Yes. The largest single-source is
3 membership, and membership incorporates a number of
4 different sources of funding, but I think that what it
5 does include are individual contributions from
6 families and individuals in response to pledge nights,
7 for example, you know, a \$50 pledge in response to a
8 particular program.

9 It also includes things like planned
10 giving, where individuals are persuaded or encouraged
11 to make television -- put a public television station
12 in their will. It can be the gift of additional
13 contributions, or contributions to a capital campaign,
14 or contributions to an endowment fund. But the
15 distinguishing characteristic is that they are
16 voluntary contributions from members of the public.

17 Q Do I understand you correctly to say that
18 pledge money is a component of this membership
19 category, but only one component of a number of giving
20 channels?

21 A That is correct.

22 Q Now, the pie chart also shows that

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1 business as a source, comprised in FY96, about 15
2 percent of total revenue, is that correct?

3 A That's correct.

4 Q Is all of that what we've been referring
5 to as underwriting money?

6 A No. It's a combination of, I would think,
7 three main subcomponents, or elements of that 15
8 percent. One would be underwriting for national
9 programs provided to producers and made part of, you
10 know, a national program distributed by PBS.

11 A second would be contributions from
12 corporations to local stations, which are acknowledged
13 by the local station on air, in that local market
14 only. And the third would be voluntary, charitable
15 contributions by corporations to public television
16 stations, which don't have an announcement on the air
17 attached to them. They're just contributions which go
18 to the general fund of the station.

19 Q And those three categories combined are
20 reflected in the 15 percent wedge of the pie?

21 A That is correct.

22 Q If you will turn two more pages into your

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1 testimony.

2 JUDGE GULIN: Before we do that, could we
3 stay with the pie chart for just a moment?

4 MR. RICH: Sure.

5 JUDGE GULIN: Mr. Downey, these charts, I
6 assume they were taken from the FY96 report -- revenue
7 report? I believe we have that in the record. Do you
8 have access to that at PB-4 -- can he be given a copy
9 of that?

10 MR. RICH: Yes, he should.

11 THE WITNESS: Yes.

12 JUDGE GULIN: All right. If can turn to
13 look at the FY96 report. First of all, it says
14 "preliminary". Has there been a final report issued?

15 THE WITNESS: Well, this data is produced
16 by the Corporation for Public Broadcasting, and I
17 don't honestly -- I don't know the answer to that. I
18 believe so, but I don't know for sure.

19 JUDGE GULIN: And if we take a look at the
20 pie chart that's on page 11, the last pie chart,
21 bottom right, where it's private, tax-based chart. I
22 assume if we take a look back at this FY96 report and

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1 we look at the first six categories, beginning with
2 "CPB appropriation", and going down to "other public
3 college"?

4 THE WITNESS: Yes.

5 JUDGE GULIN: Is that what consists of the
6 tax-based --

7 THE WITNESS: I believe that's --

8 JUDGE GULIN: -- portion of that chart?

9 THE WITNESS: I believe that's correct,
10 yes.

11 JUDGE GULIN: Okay. And then the next
12 category, is from "private college" through "all
13 other" as far as you understand, would be the private
14 portion of that chart?

15 THE WITNESS: Yes.

16 JUDGE GULIN: Okay. Thank you.

17 BY MR. RICH:

18 Q Back to page 13, Mr. Downey, of your
19 testimony. Looking at these bar graphs, what does
20 this chart tell us about what has happened to the
21 percentage of total public television income
22 represented by corporate contributions over the past

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1 five years?

2 A That's the second group --

3 Q Yes, the second group there.

4 A -- called Business? Well, as you can see,
5 the total amount of support from business has declined
6 over the period.

7 Q As a percentage of --

8 A As a percentage.

9 Q -- total money?

10 A Yes.

11 Q And overall, what conclusions if any,
12 would you draw from the depictions of each category of
13 contribution in terms of changes, if any, in the mix
14 of contributions over this 5-year period?

15 A Well, as you can see by this chart, some
16 are up, some are down. But you know, if you stand
17 back from it, in my opinion, the experience has been
18 that total revenues are basically flat.

19 Q Just so the record is clear, both the pie
20 chart on page 11 and this chart on page 13 depict
21 system-wide public television income, correct? Not
22 merely PBS as a source?

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1 A That is correct. CPB is obliged to
2 collect revenue information in keeping with the
3 appropriations regulations or laws, and does so and
4 has done so, for -- since its inception. It collect
5 revenue and expense information from every station,
6 every year.

7 So what you see here is the revenue
8 received by all public television and radio stations,
9 I believe -- no, this is television only -- all public
10 television stations during the years fiscal '92 to
11 '96.

12 Q You testified a few questions back about
13 the ever-changing sources of revenue for the system
14 over time. What determines, in any given year, where
15 public television revenue comes from?

16 A Well, you know, we have limits -- at the
17 end of the day we have limited resources, and so one
18 of the things we try to do is to apply the resources
19 we have in areas which we think will be most
20 productive in revenue terms.

21 For example, in the 1970s a lot of energy
22 was invested in developing Federal support. In the

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1 late '70s and into the '80s, sort of attention shifted
2 -- you know, we sort of maximized and figured out how
3 to do that, and shifted our resources more towards
4 membership.

5 And some of you will not be pleased to
6 hear that we tried to develop the whole concept of
7 pledging and doing on-air fundraising -- which is of
8 annoyance to some but it is the single, most cost-
9 effective, fundraising mechanism we have.

10 But in many ways we have exploited that to
11 its limits by trying to do more pledging, which would
12 simply annoy the audience, without concomitant
13 increases in revenue, and so we've in a sense, sort of
14 shifted our focus to developing relationships with
15 media partners.

16 So that for example, we have a
17 relationship with the Disney company for the
18 production of a series called "Bill Nye, The Science
19 Guy". And it's a way of finding new sources of
20 revenue to assist us in making programs available, but
21 doing it with, frankly, with other people's money.
22 And that is a way of enhancing, extending, broadening

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1 the service we provide, to benefit the public and the
2 viewers.

3 Q Are there other, new areas or new funding
4 approaches that PBS is either considering, or
5 experimenting with, or ruling out, in recent times?

6 A Well, another area that we've explored and
7 expanded our efforts is -- one is direct mail, another
8 is telemarketing, yet another is -- I mentioned a
9 moment ago -- planned giving.

10 MR. SCHAEFFER: I rise only to say I have
11 no problem with this, but none of this is in the
12 direct testimony.

13 CHAIRPERSON GRIFFITH: Mr. Rich, do you
14 want to respond to it?

15 MR. RICH: This was my last question on
16 this. I think it's covered in the broad range of --

17 MR. SCHAEFFER: I'm satisfied. We'll
18 cover this in some depth on cross.

19 CHAIRPERSON GRIFFITH: All right.

20 MR. SCHAEFFER: As long as Mr. Rich has
21 raised it.

22 BY MR. RICH:

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1 Q Did you complete your answer?

2 A I did.

3 Q Mr. Downey, is there a direct relationship
4 between public television to income stream and the
5 value of the music it uses?

6 A Not that I can see. We certainly use
7 music, but I think the reason, either individuals
8 contribute, or states contribute, or the Federal
9 Government contributes, are many and varied, and may
10 have some relation or may have no relation,
11 whatsoever, to the use of music.

12 For example, many state governments
13 contribute funds to the operation of a public
14 television system within that state in order to
15 support the distribution of educational or
16 instructional materials to schools. It really has
17 nothing to do even, with the content of the program;
18 it has to do with providing a distribution service.

19 As I mentioned before, there are some
20 stations licensed to local school boards.

21 MR. SCHAEFFER: I'm going to object. None
22 of this is in the direct.

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1 CHAIRPERSON GRIFFITH: Mr. Rich?

2 MR. RICH: Your Honors, I believe this is
3 all in the direct testimony of the witness --

4 MR. SCHAEFFER: No --

5 MR. RICH: Looking at page -- what I think
6 he's -- 14, 15, and 16 -- yes, precisely; page 14.
7 The relationship of public television income to the
8 value of particular programming, let alone music's
9 contribution to it, is quite in direct. For example,
10 it goes on to talk about governmental -- exactly what
11 he's testifying to --

12 MR. SCHAEFFER: No, he's talking --

13 MR. RICH: I'm sorry, if I may. It's just
14 an example of governmental sources of income and
15 others that demonstrate the lack of relationship.
16 It's directly tied to this paragraph on page 14.

17 MR. SCHAEFFER: All that 14 -- I don't
18 want to foreclose anything for the arbitrators and in
19 cross examination much of this may come up, but I must
20 say, this is not at page 14. All that's referred to
21 on page 14 is the bulk of their money comes from
22 government and that music has nothing to do with

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1 government. It's not talking about mail order or any
2 of these other things he's talking about.

3 JUDGE GULIN: Well, he says public
4 television music simply plays no role in financing the
5 equation. I think the example following that --

6 MR. SCHAEFFER: It says, for example, but
7 -- I'm willing to go on --

8 CHAIRPERSON GRIFFITH: He's testified that
9 PBS income is not dependent on the value of the music
10 used.

11 MR. RICH: Yes.

12 CHAIRPERSON GRIFFITH: Do you withdraw
13 your objection after --

14 MR. SCHAEFFER: I'll withdraw my
15 objection.

16 CHAIRPERSON GRIFFITH: All right, thank
17 you.

18 MR. RICH: Thank you.

19 BY MR. RICH:

20 Q Do you want to continue your answer, sir?

21 A Just to say again, that the reason
22 government institutions, colleges, universities,

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1 school systems, corporations, member of the public
2 contribute to public television, are as different as
3 the number of contributors.

4 There are some for whom music may be very
5 important. There are others for whom it's just not
6 relevant. So I would dispute or disagree that there's
7 any direct correlation across the board, between use
8 of music and our service.

9 Q System-wide -- that is, television system-
10 wide, Mr. Downey -- what has happened to programming
11 expenditures by public television stations over the
12 past five years? This is now reference to your
13 testimony at pages 17 and 18.

14 A Essentially, spending on programming on
15 public television over the past five years has been
16 flat, basically. You know, gone up a little and then
17 gone down a little, and then gone up a little, and
18 then down a little. But again, if you stand away from
19 it, I think the only word that adequate describes it
20 is flat.

21 The same is true of PBS within that larger
22 sphere, but the amount we've been spending on

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1 programming has remained essentially flat, and has
2 actually gone down in some cases.

3 Q Focusing on the system-wide programming
4 expenditures, is there a process for gathering such
5 data, system-wide?

6 A Yes. As I mentioned before, the
7 Corporation for Public Broadcasting collects from
8 every station its certified, financial statements, and
9 then sums up from each of those statements, all of the
10 revenues and then calculates all of the expenses made
11 by all of the stations. And so we have a snapshot for
12 each fiscal year, of the amount of spending in several
13 expense categories, and all of the revenue data that
14 you see in my testimony.

15 Q To your knowledge, this activity is
16 conducted in the ordinary course of CPB's activities?

17 A Yes. In actual fact, the Federal
18 appropriation is a matching appropriation, which
19 matches contributions from all other sources. And so
20 there's a regular, legislative requirement in effect,
21 for CPB to calculate, to produce documentation of all
22 of the revenues of all of the public television

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1 stations as part of the appropriation process.

2 Q Is there as well, an incentive for
3 stations to cooperate and accurately produce data in
4 response to CPS's request?

5 A There is indeed. As a condition of
6 receiving a television community service grant, which
7 is the name given to the Federal funds that flow from
8 CPB to the stations -- as a condition of receipt of
9 that grant, the station has to submit the financial
10 data that I've just described.

11 Q To your knowledge, were these system-wide,
12 programming expenditure data supplied to PBS and NPR's
13 expert economist in this proceeding, Dr. Jaffe?

14 A Yes, they were.

15 Q And do you know whether any adjustments
16 were made to that data by Dr. Jaffe?

17 A I believe Dr. Jaffe did make some
18 adjustments to that data, yes.

19 Q I take it though, as between you and Dr.
20 Jaffe, he would be the right person to explain the
21 nature and rationale for those adjustments?

22 A Please.

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1 Q I take it you've adopted those system-wide
2 data with those adjustments for purposes of your
3 testimony, correct?

4 A That is correct. Yes.

5 Q And if you'd look at PB Exhibit 6, please,
6 am I correct that the television line -- these are
7 both radio and television programming and production
8 expenditure data -- but am I correct that the
9 television line reflects the system-wide data you've
10 just been testifying to?

11 A Yes, it does.

12 Q My colleague reminds me that this list is
13 pre-adjustment. I guess the legend at the top says,
14 unadjusted. I should have pointed that out to you and
15 to the panel.

16 A It does say unadjusted.

17 Q All right, and we'll then leave to Dr.
18 Jaffe and Appendix B of his testimony, the explanation
19 of the adjustments that were made to that data.

20 Now, am I correct that the data as
21 adjusted and as you testified to at page 17 of your
22 written, direct testimony, indicates total television

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1 programming expenditures of \$648.8 million in FY92
2 versus \$675.7 million in FY96, is that correct?

3 A That is correct.

4 Q And you report that to be an increase of
5 about 4.1 percent over that period?

6 A Correct.

7 Q Now, you also testified a few moments ago
8 that PBS also keeps track of funding dollars spent on
9 PBS's programming as opposed to system-wide, is that
10 correct?

11 A That is true, yes.

12 Q What process brings about that data
13 collection?

14 A When a producer submits a program to PBS
15 for distribution, we require the producer to disclose
16 to us who may have paid for the program -- all of the
17 sources of funding that went into the production of
18 the program.

19 And then we keep track of that and then at
20 the end of the year are able to provide information as
21 to both the total amount -- or total value of the
22 programming distributed, as well as the sources of

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1 those fundings; whether from corporations or
2 television producers or private individuals, or what-
3 have-you.

4 Q And if you would turn to the documents
5 appended to Exhibit 7, please? Can you tell me if the
6 document labeled, "Program Information Notebook" are
7 the documents prepared periodically which incorporate
8 the results of this data-gathering process?

9 A The Program Information Notebook is an
10 annual publication that summarizes the data to which
11 I have just referred.

12 Q And if you would turn to the very last
13 page of this compendium, which is labeled A-6,
14 relating to the report for FY 1995. Am I correct that
15 it depicts for a series of years, the funding of
16 original broadcast hours distributed by PBS, is that
17 correct?

18 A Yes.

19 Q And back to your testimony at page 18, at
20 the top, there is a reference to FY 1992 funding, PBS
21 funding, for original broadcast hours of \$300.9
22 million, is that correct?

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1 A Yes.

2 Q And that's drawn from, and consistent
3 with, the entry at page A-6, is that correct?

4 A Well actually, at the bottom of 17 -- this
5 could have been clearer. The sentence reads, "PBS's
6 funding of original broadcast hours declined during
7 the period FY92 to '96, from 300.9 to 291".

8 We sometimes slip back and forth between
9 the use of PBS to describe the corporation in
10 Alexandria, Virginia, and PBS in its broader
11 application, to the entire public television system in
12 America. The figures 300.9 million to 291.6 million
13 over the period of '92 to '96, are applicable to the
14 entirety public television.

15 The amount that passed PBS, the value of
16 the programming distributed by PBS during that same
17 period, is a smaller number, because PBS's programming
18 is only a portion of all of the programming
19 distributed nationwide.

20 Q Am I understanding your clarification to
21 be saying that the \$300.9 million in FY92 nevertheless
22 relates to the funding of original broadcast hours

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1 distributed by PBS?

2 A Yes, it does.

3 Q Okay. Whether or not PBS was the source
4 of the funding itself or third parties may have been
5 the source of that funding?

6 A The value of the programming distributed
7 by PBS -- in other words, that passed through PBS in
8 fiscal '92 -- was \$300.9 million. And in '96, as you
9 see on page 18, was \$291.6 million.

10 Q Where does the FY96 number come from? I
11 see that the compendium here as Exhibit 7 only goes to
12 FY95.

13 A At the time we supplied these copies of
14 the Program Information Notebook the '96 number had
15 not been calculated, or was not ready. It has
16 subsequently -- that data has subsequently been
17 completed, you know, the summary reports.

18 Q That report was not yet finalized at that
19 time?

20 A At that time, that's correct.

21 MR. RICH: May I have one moment, please?

22 CHAIRPERSON GRIFFITH: All right.

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1 BY MR. RICH:

2 Q Mr. Downey, what impact has this funding
3 environment -- that is, the system-wide funding of
4 programming at PBS and funding relating to PBS-
5 distributed programming -- had in your own experience
6 with PBS, had on PBS's own dealing with program
7 producers? I'm sorry for garbling that question.

8 A Well, over the past five years as you see
9 the big picture -- in other words, all of the money
10 spent by system-wide on programming -- has remained
11 essentially flat, and that's no less the case with
12 respect to PBS.

13 And for example, over that 5-year period
14 I can think of a couple of programs -- Great
15 Performances, for example, which is essentially a
16 weekly, cultural performance program -- the amount of
17 funds flowing from PBS to that series over the period
18 has declined by three percent over the five years.

19 The amount of funding we supplied to Wall
20 Street Week has declined by almost ten percent over
21 that same 5-year period. Some of our -- even some of
22 our most popular programs -- and I'm thinking of

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1 American Experience, Mr. Rogers, NOVA, Washington Week
2 In Review -- the increase provided over the 5-year
3 period has been about two or two-and-a-half percent
4 for those programs.

5 And that's not per year; that's over five
6 years. So it's about half-a-percent per year. And
7 this again, by way of saying, we have not had the
8 resources to substantially increase anybody's funding
9 over the period.

10 Q In that environment, how appropriate would
11 it be in your estimation, for music copyright owners
12 to receive a significant increase?

13 A It wouldn't seem appropriate to me, if you
14 know, all the other things being flat or declining,
15 it's hard for me to understand what the basis would be
16 for a substantial increase to the music composers.

17 Q What percent of the total hours of
18 programming broadcast by all public television
19 stations did PBS distributed programming represent
20 over the last license term? And by that I mean the
21 period approximately 1993 through 1997.

22 A It hovers at around 60 percent.

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1 Q And approximately how many hours of
2 original programming does PBS distribute each year?

3 A That varies between 1600 to 1800 of
4 original programming per year.

5 Q And by how much has that varied over the
6 last 20-year period?

7 A Not very much. It in many respects, is
8 constrained by the number of prime-time program hours,
9 which is our essential duty to provide programs to
10 stations. And so unless and until we can invent more
11 prime-time hours, we're not likely to distribute more
12 program hours.

13 Q Let's talk finally, about what's been
14 happening to public television's program mix. And
15 here I would direct yours and the panel's attention to
16 another part of this, appearing at page 21 of your
17 written testimony.

18 CHAIRPERSON GRIFFITH: Mr. Rich, before
19 you do that, let me just ask Mr. Downey one question.
20 If you can go all the way back to Exhibit 6, please;
21 public television and public radio programming and
22 production expenditures.

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1 You show under radio, 1992, 171 million,
2 and it continues to go up to 192, and then
3 significantly drops off in '96. Whereas television
4 programming and production expenditures go from 658 to
5 675 in '96.

6 Is there any significance to the fact that
7 radio dropped so dramatically?

8 THE WITNESS: There may be. My colleague,
9 Peter Jabelow, I believe will be testifying tomorrow
10 or the next day, and he -- I'm the television
11 representative and he's the radio rep, and I would
12 like to defer to him, if I may.

13 CHAIRPERSON GRIFFITH: I hope I don't
14 forget. I've written it down, anyhow.

15 MR. SCHAEFFER: I promise you I'll ask
16 him.

17 CHAIRPERSON GRIFFITH: All right. Fine.

18 JUDGE GULIN: Let me ask you this, Mr.
19 Downey, about television. The revenues have been flat
20 since '92 you say. Do you have a figure, by the way?

21 THE WITNESS: Revenues for public
22 television?

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1 JUDGE GULIN: Public television.

2 THE WITNESS: I believe that's in the
3 exhibits here.

4 JUDGE GULIN: Off the top of your head you
5 don't know what that --

6 THE WITNESS: Not off the top of my head,
7 no.

8 JUDGE GULIN: All right. Programming
9 expenditures for television have increased 4.5
10 percent, was that your testimony?

11 THE WITNESS: Over the period, yes.

12 JUDGE GULIN: From '92 to '96. Now, when
13 the parties to this proceeding negotiated their
14 agreement in '92, those '92 figures were not available
15 to them, is that correct? Do you know?

16 THE WITNESS: I don't know. It takes a
17 good while after the fiscal year for the data to
18 become, you know, available.

19 JUDGE GULIN: So in all likelihood if they
20 were interested in these figures they would have been
21 looking at FY91 figures?

22 THE WITNESS: That's logical.

1 JUDGE GULIN: And I'll note that as far as
2 I can tell, there were no '91 revenue figures or
3 programming figures, I don't believe, for FY91 in the
4 record at this point. I believe we have '85, '90, '92
5 to '96. There's no '91.

6 MR. RICH: I believe, Judge Gulin, if you
7 look --

8 CHAIRPERSON GRIFFITH: Unless I'm wrong.

9 MR. RICH: -- in the annual reports that
10 are appended as Exhibit 4 -- for example, look at FY92
11 -- you'll see comparative data from FY91 --

12 JUDGE GULIN: Percentage change, dollar
13 change? Is that what you're referring to?

14 MR. RICH: There's actually dollars
15 depicted and totals and percentages in the second and
16 third columns.

17 JUDGE GULIN: Ah, I see. Okay.

18 CHAIRPERSON GRIFFITH: All right. Now Mr.
19 Rich, I forgot now, where you told us to turn.

20 JUDGE DREYFUS: Before we turn --

21 CHAIRPERSON GRIFFITH: Sure.

22 JUDGE DREYFUS: -- one simple question

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1 about the 1600 to 1800 hours. That's for 365 days a
2 year?

3 THE WITNESS: Yes.

4 JUDGE DREYFUS: So on the average, that's
5 somewhere between four and five hours a day, is that
6 correct?

7 THE WITNESS: Well, the service we provide
8 to stations consists of a children's block, and then
9 essentially from 7 Eastern to midnight Eastern; so
10 about five hours a night.

11 JUDGE DREYFUS: Okay, but I'm trying to
12 relate that to the 60 percent. You said that 60
13 percent was PBS-distributed.

14 THE WITNESS: That is correct. If you
15 watch the output of a local public television station,
16 about 60 percent of its programs will be PBS-
17 distributed programs.

18 JUDGE DREYFUS: As represented by this
19 1600 to 1800 hours?

20 THE WITNESS: No, because the -- generally
21 speaking, programs we acquire, we acquire rights for
22 a period of three years. And a station is free to use

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1 it some multiple number of times over the three years.

2 JUDGE DREYFUS: Okay. I understand.

3 MR. RICH: Perhaps my question wasn't
4 clear enough, Judge Dreyfus. I was attempting to
5 elicit that figure for originally produced in any year
6 as opposed to distributed, which would include both
7 originally produced and re-broadcast.

8 JUDGE DREYFUS: Right. I understand.

9 MR. RICH: Thank you.

10 BY MR. RICH:

11 Q Do you have the chart on page 21 of your
12 written testimony in front of you, sir?

13 A Yes.

14 Q Can you tell me what, if any, trends in
15 terms of public television's program mix are reflected
16 in the chart and in your accompanying testimony?

17 A Well, the most noteworthy changes -- and
18 this is a bi-annual -- that's every two years -- study
19 that tries to take a snapshot of the mix of
20 programming available on public television stations.

21 And I think what's noteworthy is the
22 increase in news and public affairs programming over

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1 the period, and the increase in children's programming
2 and a decrease in cultural programming. Otherwise,
3 the data are relatively stable.

4 Q And when you depict the increase in
5 children's programming am I correct that going down
6 the column entries you would be combining the
7 categories, general children and youth and Sesame
8 Street, for that purpose?

9 A Yes.

10 Q Now, you mentioned that these are the
11 product of bi-annual surveys. Who conducts those
12 surveys?

13 A The survey is commissioned by CPB, and for
14 years it's been conducted by a gentleman by the name
15 of Nat Katzman. And as I said, the idea is to take a
16 snapshot of the mix of programming available to the
17 public in these 2-year intervals. And it's, you know,
18 data that we've had to rely on for 10, these many
19 years.

20 Q And is the information depicted at PB
21 Exhibit 3 an example of the manner in which that
22 information is gathered and reported periodically?

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1 A Yes. The research notes for the period in
2 Exhibit 3 are based on the Katzman data that are
3 again, collected bi-annually.

4 Q Now, if we were to examine trends in the
5 program mix of PBS-originated programming -- let me
6 back up and ask this. The information depicted on
7 page 21 is again, system-wide; not limited to PBS-
8 distributed programming, is that correct?

9 A Yes. The Katzman data are a snapshot of
10 what all the stations are doing.

11 Q And let's now focus going forward three
12 pages in your written testimony, to page 24 on trends
13 in programming mix with respect to PBS-originated and
14 distributed programming. What trends do you identify
15 and how do they compare to the trends you just
16 testified to system-wide?

17 A Well, not surprisingly, the trends are
18 similar since two-thirds of what the stations
19 broadcast comes from us. And as you see, the
20 percentage of -- relative percentage of children's
21 programming has increased while cultural programming
22 has decreased.

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1 And public affairs programming, again, has
2 increased while the others have remained relatively
3 stable.

4 Q And at the risk of being repetitive, how
5 are these particular data gathered?

6 A Again, every program that passes through
7 PBS, we weigh and measure in several regards: its
8 cost, who paid for it, and of course, what the subject
9 matter is and who appears in the program. And all of
10 this is gathered into a PBS program database from
11 which this information was derived.

12 Q Looking ahead over the next five years,
13 sir, what changes in public television's program mix
14 and funding environment along the lines you've
15 discussed, do you envision?

16 A I wish I could be more optimistic. I have
17 to assume that there will be relatively little change
18 over the coming years. There's no reason to suspect
19 major increases in funding from any of the sources
20 that we rely on, and I'm not aware of any plans to
21 make any substantial changes in the mix of program
22 subjects or you know, subject matter that we

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1 distribute.

2 MR. RICH: Thank you. I have no further
3 questions.

4 CHAIRPERSON GRIFFITH: All right.

5 MR. SCHAEFFER: I wonder if we could take
6 a short break to set up because I think my cross is
7 going to take much of the day.

8 CHAIRPERSON GRIFFITH: All right. Do you
9 want to --

10 MR. SCHAEFFER: Whatever it will take to
11 get the documents set up. Ten minutes? Or five
12 minutes.

13 CHAIRPERSON GRIFFITH: How many witnesses
14 do we have scheduled for today, again?

15 MR. RICH: We're prepared to proceed with
16 Mr. Jabelow, although Mr. Schaeffer apparently, has a
17 rather extensive cross examination.

18 MR. SCHAEFFER: It is conceivable we will
19 not -- we will certainly finish Downey today; whether
20 we will finish Jabelow -- there are two crosses --

21 MR. KLEINBERG: Not to be the proverbial
22 potted plant but I may, myself, have a few questions

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1 for the witness.

2 MR. SCHAEFFER: It will be a very lengthy
3 day with Mr. Downey. So we hope to get - maybe we can
4 do Jabelow's direct today.

5 CHAIRPERSON GRIFFITH: Do you -- Mr.
6 Schaeffer, do you or Mr. Kleinberg have any preference
7 as to which one cross examines first?

8 MR. SCHAEFFER: I think we agreed on, the
9 next two witnesses I would go first, and after that,
10 he would go first.

11 CHAIRPERSON GRIFFITH: All right. How
12 much time do you need?

13 MR. SCHAEFFER: Ten minutes, Judge. I
14 just want my colleagues to set up their documents.

15 CHAIRPERSON GRIFFITH: All right. Ten
16 minutes then, please.

17 (Whereupon, the foregoing matter went off
18 the record at 11:04 a.m. and went back on
19 back on the record at 11:18 a.m.)

20 CHAIRPERSON GRIFFITH: All right. Mr.
21 Schaeffer, are you ready, sir?

22 MR. SCHAEFFER: Thank you. Yes, I am.

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CROSS EXAMINATION

(On behalf of ASCAP)

BY MR. SCHAEFFER:

Q Good morning, Mr. Downey.

A Good morning.

Q Forgive me for sitting but I can't read my notes if I stand. I'd like to start out with a couple of definitions.

It is true, is it not, that underwriters in public broadcasting are third parties that have voluntarily contributed cash or in-kind services to finance in whole or in part, the production or acquisition of a public television program?

That's the definition, is it not?

A Yes.

Q And carriage, the word carriage means -- in public broadcasting parlance, or in broadcasting parlance -- means the actual showing or broadcasting of a program, isn't that correct?

A Yes.

Q And common carriage, does it not, mean the carrying of broadcasts on a number of different

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1 stations at more or less the same time, isn't that
2 correct?

3 A Yes.

4 Q And a producer in the broadcasting field -
5 - both public and commercial -- would be somebody who
6 creates programming, wouldn't it?

7 A Yes.

8 Q Similarly, in the public broadcasting
9 parlance, producing stations are those broadcasting
10 stations in the public system that produce programs
11 that are broadcast by themselves and others and in the
12 system, isn't that correct?

13 A That is a phrase commonly used to refer to
14 those stations who supply a great deal of programming
15 to people.

16 Q And it is also true that both the
17 producing stations and the producers in public
18 broadcasting, seek as much common carriage as possible
19 in the distribution of their programs, isn't that
20 true?

21 A Depends on the program. There are some
22 programs distributed by PBS, essentially during prime-

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1 time hours, where producers are very anxious to have
2 their programs be designated as common carriage
3 programs.

4 There are other programs -- I'm thinking
5 of children's programs, for example -- where the
6 producer is just not relevant.

7 Q Let's keep our attention on the former
8 rather than the latter. There are then, a number of
9 programs that the producers are very, very concerned
10 should be carried on at the same time by the stations,
11 isn't that correct?

12 A Yes.

13 Q And the reason for that, is it not, is
14 because the underwriters as I have defined them, are
15 very anxious that the programs be shown in prime-time,
16 isn't that correct?

17 A I think you can't make so broad a
18 generalization. There are many different kinds of
19 underwriters. Foundations, for example, or the
20 Federal Government itself, who may be indifferent as
21 to when the program is shown.

22 Q With respect to corporate underwriters --

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1 Mobil, Texaco, the like -- those underwriters -- isn't
2 it a fact that they are very, very concerned that the
3 programs they underwrite be broadcast in prime-time?

4 A That is not a universal --

5 Q All right.

6 MR. RICH: Can he finish he answer,
7 please?

8 MR. SCHAEFFER: Sure.

9 THE WITNESS: Different corporations
10 underwrite for different reasons. Ah --

11 MR. SCHAEFFER: Would you --

12 CHAIRPERSON GRIFFITH: Go ahead. Are you
13 finished?

14 THE WITNESS: Yes.

15 MR. SCHAEFFER: I'd like to put before the
16 witness an exhibit that we've designated as 505.69.
17 Give it to the arbitrators first and then just put it
18 in front of the witness.

19 CHAIRPERSON GRIFFITH: Mr. Schaeffer, so
20 you want this marked for identification?

21 MR. SCHAEFFER: Yes, I do. I'm going to
22 ask some questions about it.

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1 CHAIRPERSON GRIFFITH: All right. What's
2 the number on this?

3 MR. SCHAEFFER: This would be our first
4 cross examination exhibit.

5 CHAIRPERSON GRIFFITH: Right. All right,
6 ASCAP Exhibit 1X.

7 MR. SCHAEFFER: Thank you.

8 JUDGE GULIN: Is this already in?

9 MR. SCHAEFFER: Well, it's one of the
10 Grajeda exhibits. All right. Some of them will be
11 common. We'll eventually have to have a concordance.

12 (Whereupon, the above-referred
13 to document was marked as ASCAP
14 Exhibit No. 1X for
15 identification.)

16 MR. SCHAEFFER: Why don't you take an
17 opportunity if you would, Mr. Downey, just to read
18 ASCAP 1X to yourself? And let me know when you're
19 finished, Mr. Downey.

20 JUDGE DREYFUS: Is there a date?

21 MR. SCHAEFFER: Yes, it's on the lower,
22 right-hand corner. It's November 20th, 1995. All of

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1 those have on the right-hand corner, a date.

2 Thank you, Mr. Downey. May I continue?

3 THE WITNESS: Please.

4 BY MR. SCHAEFFER:

5 Q Are you familiar with a periodical known
6 as Current?

7 A Yes.

8 Q What is Current?

9 A It's a publication of -- trade publication
10 within the public television family.

11 Q Public broadcasting isn't it? It covers
12 radio as well?

13 A Yes, you're correct.

14 Q And it appears bi-weekly?

15 A I believe that's correct.

16 Q Do you have an understanding as to who
17 owns Current?

18 A I believe it's owned by a consortium of
19 public television stations.

20 Q I think public broadcasting stations, but
21 --

22 A Broadcasting stations.

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1 Q -- I think for our purposes it's the same
2 difference. Do you read Current frequently?

3 A Yes.

4 Q You note your name appears in Current on
5 the first and third columns of this particular
6 article, do you not?

7 A I see I'm in the third column.

8 Q Okay. And you're also, I think you'll
9 find, in the first column on the second page.

10 A Oh, I'm sorry.

11 Q That's you, isn't it?

12 A That is me.

13 Q Let me just ask you, have you ever read
14 this article before?

15 A I think so.

16 Q Now, the first line of this article says,
17 common carriage has been debated to death, and into
18 the afterlife by public TV stations. Is that somewhat
19 colorful statement true, in your opinion?

20 A It has certainly been debated at great
21 length over many years.

22 Q And then would you just drop down to --

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1 and forgive me because my eyes aren't good so I'm
2 going to have to take my glasses off -- at the bottom
3 of the first column there's a quotation attributed to
4 a Lance Ozier, the director of Marketing for WGBH. Do
5 you know him?

6 A I do.

7 Q And would you agree with Mr. Ozier's
8 characterization that the origins of this policy are
9 in the need to be able to reassure underwriters that
10 the show they're underwriting and the credits and the
11 off-the-air activities, will happen on a certain date
12 and time? Or would you disagree with Mr. Ozier?

13 A That's Mr. Ozier's opinion. There are
14 other reasons for the common carriage policy.

15 Q Well, then you disagree with Mr. Ozier?

16 A That -- I don't disagree with him. That's
17 his opinion.

18 Q Well, is this, in your opinion, is this an
19 origin of the policy of common carriage?

20 A It is one of several origins.

21 Q I won't bother asking you to quantify
22 that. Would you then go through -- well, let's try

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1 this, then. The second column says, Mobil and Aetna,
2 which at one time provided full or sole corporate
3 support for Masterpiece Theater, Mystery and American
4 Experience became "fed up" by variance in stations
5 broadcast schedules across the country, Ozier added.

6 Do you agree with that statement?

7 A I can't -- I have no knowledge of, you
8 know, whether that's true or not.

9 Q You were not involved in your capacity as
10 head of programming at PBS as to whether or not that
11 was a reason for Aetna and Mobil discontinuing their
12 support?

13 A Let's be clear. I'm not head of
14 programming at PBS.

15 Q I see. Who at PBS, would know that?

16 A As to --

17 Q Whether Ozier's comment is true?

18 A I don't know.

19 Q Incidentally, Ozier's station was the
20 producing station for those shows, wasn't it?

21 A It's the presenting station. It doesn't
22 produce the programs; it acquires them from third

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1 parties and presents them on PBS.

2 Q So, so-to-speak, they are -- WGBH was the
3 station, the entity in the system more directly
4 associated with the marketing of those shows --

5 A That is correct.

6 Q -- that would be a fair comment? Okay.
7 Then the article goes on in the second column from
8 which I'm reading, saying Mobil also abandoned its
9 efforts to promote Masterpiece Theater and Mystery
10 with national ads, because stations ran the programs
11 at different days and times, Ozier said.

12 "The crazy quilt of broadcast schedules
13 made it just impossible to promote with national ads."
14 Carriage is inconsistent, even among stations in the
15 top-10 or 20 markets.

16 You don't agree or disagree, or do you
17 agree with Ozier's comment there?

18 A I agree that programs from time to time,
19 are carried by stations at very different times, and
20 that that can be disadvantageous if our objective, for
21 example, is to ensure that the program is seen by as
22 -- the largest audience we can assemble for it.

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1 Q Has it ever been communicated to you that
2 some of the major underwriters as I have defined the
3 term, are dissatisfied if their shows don't appear in
4 prime-time, or appear at different hours throughout
5 the system? Hasn't that been said to you?

6 A There's certainly anecdotal evidence of
7 underwriter disappointment that their programs may not
8 have been carried uniformly throughout the system by
9 all stations.

10 Q And that dissatisfaction has been
11 expressed on a number of occasions by what I would
12 describe and I think you would describe, as major
13 underwriters, isn't that true?

14 A It's hard to quantify that or to put it in
15 some context. If that were universally true of every
16 underwriter all the time, then either there wouldn't
17 be underwriters or everybody would commonly carry all
18 programs all the time. What you see is that this
19 continues to be a debate which is evidence to indicate
20 that it's not a universal complaint or dissatisfaction
21 of every underwriter. Again, it varies from case-to-
22 case.

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1 Q Not a matter of concern to you, I assume?
2 In the system? Common carriage is for you, not a
3 problem in the system?

4 A I happen to believe in the value of it and
5 the importance of it, as do -- we have instituted a
6 new common carriage policy. It's not the first time
7 we've done this but it's been in operation now for
8 about two years. And at this occasion it's been
9 successful. Stations are observing it.

10 Q Now let's go on though -- maybe I'll get
11 back to your answer but let's just go on with this
12 article. By the way, do you know Karen Everhart
13 Bedford?

14 A I do.

15 Q Who is she?

16 A She is a reporter for Current magazine.

17 Q Reasonably well regarded by you?

18 A Yes.

19 Q Now, this goes on -- and I think this is -
20 - not a quote from Ozier so I'm just asking your
21 reaction; whether you think this is accurate or not.

22 Within the last decade corporate sponsors

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1 have begun seeking additional marketing tie ins that
2 "will help their business, he continued". I guess it
3 is Ozier. Underwriters don't just want on-air
4 credits; they want them to "coincide with other things
5 they're doing".

6 Isn't that a true statement?

7 A There has been a change in -- the reasons
8 or the process by which corporations come to
9 underwrite programs over the past ten years or so. In
10 the 1980s typically, underwriting funds came from
11 corporate communication's budgets. Corporations
12 wishing to perform charitable acts or simply be
13 associated with quality.

14 During the more recent times corporations have -
15 - the budgets from which program underwriting comes
16 have tended to be in the marketing and advertising
17 budgets, which are much more -- typically much more
18 closely tied to bottom-line consideration. That is a
19 fact.

20 Q So that you do agree with Mr. Ozier's
21 statement which I just read?

22 A There are some --

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1 Q Yes or no?

2 A -- some underwriters for whom -- who want
3 -- well, some underwriters -- the reason they're doing
4 it, again, is to associate with quality, to associate
5 themselves with the fine program presented to the
6 public, and they want to gain benefit from that
7 association.

8 And so will undertake to, not simply
9 underwrite the program, but perhaps put stories in
10 their employee newsletters or have other public events
11 associated with the program. And so there's a -- yes,
12 there's a more coordinated, more broad-based effort to
13 associate themselves with the program.

14 Q And they sometimes want to put it in
15 periodicals of general interest, don't they? Not just
16 employee newsletters?

17 A I'm sorry, put what in?

18 Q Companies like Mobil and Aetna want to
19 have a coincidence of the shows with print advertising
20 in the general media, don't they?

21 A Some of our underwriters do take out print
22 -- you know, print ads supporting their own

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1 investment, yes.

2 Q And it's important to them -- at least
3 those underwriters, whomever they may be -- that there
4 be common carriage, isn't that correct?

5 A Again, it depends on the underwriter.
6 Some are interested in achieving whatever -- achieving
7 maximum impact, however they define that. Others are
8 less interested or concerned about that.

9 Q Now, the story goes on to quote you. It
10 says -- maybe you want to follow on because I'm going
11 to ask you if you think it was accurate -- with 200
12 different station programmers within the system,
13 "there is always going to be difference in the way
14 they prefer to schedule their stations", said Peter
15 Downey, PBS senior VP of Program Business Affairs.

16 "It's not as if there's a short of list of
17 people who consistently or persistently do this. It's
18 more of a random occurrence." Was that your
19 sentiments at the time?

20 A I think this is probably accurate, yes.

21 Q All right. Then you go on to say, "What's
22 really important to producers is the promise of

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1 performance, as well as the performance itself",
2 Downey added. "Sooner or later an underwriter says,
3 'do all stations carry the programs at the same time?'
4 For many years producers have had to say, well, we
5 can't guarantee that."

6 Is that a substantially accurate quote
7 from you on this occasion?

8 A Yes, in this context.

9 Q Now, it then goes on to say, PBS's
10 proposed carriage rules which were revised this summer
11 after stations balked at the use of fines to enforce
12 compliance, call for stations that buy the full,
13 national program service to carry 300 of the 350
14 programming hours designated for common carriage. I
15 take it that was a true statement, certainly in 1995?

16 A Yes.

17 Q Now, what were the proposed carriage rules
18 before they were revised?

19 A I'm trying to recall.

20 Q Did they involve a fine as suggested here?

21 A They did not.

22 Q Well, why don't you tell us, as best you

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1 can recall?

2 A As best I can recall, the last common
3 carriage -- well, back in the early '80s there was a
4 plan whereby stations were expected but certainly not
5 required to carry two hours a night Sunday through
6 Wednesday. So 8 to 10, Sunday, Monday, Tuesday,
7 Wednesday.

8 But then there's that of -- then we got
9 away from that sort of formal designation and more to
10 an informal, program-by-program, title-by-title
11 designation. And then what this article is referring
12 to is a more formal approach measured by program hours
13 over the course of a year rather than particular time
14 slots on particular evenings.

15 Q This emanated from PBS, I take it?

16 A In collaboration with its stations.

17 Q And Ms. Bedford apparently, was under the
18 apprehension -- or perhaps a misapprehension -- that
19 the proposed rule was using fines to enforce
20 compliance. That's just wrong, is that correct?

21 MR. RICH: Objection to the form. It's
22 asking what's in some reporter's head.

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1 MR. SCHAEFFER: No, I'm asking -- well,
2 let me put it a different way.

3 BY MR. SCHAEFFER:

4 Q Is it your understanding that a claim,
5 that the originally proposed carriage rules contained
6 fines on stations that didn't comply with the common
7 carriage rules? Whether that is wrong?

8 A Well, let me state that there's an
9 affirmative fact. We have a common carriage policy
10 administered by the PBS Board of Directors, and if a
11 station is out of compliance with that policy the
12 station is exposed potentially, to a monetary fine.

13 Q And what is the nature of that fine, Mr.
14 Downey?

15 A That's up to the Board.

16 Q I see. Has anybody ever been fined?

17 A No.

18 Q And how long has that penalty been in
19 existence?

20 A We are now midway into the third year of
21 this present iteration of a common carriage policy.

22 Q So it started around 1995?

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1 A Yes, about the time this article --

2 Q About the same time as this article?
3 Okay. Then -- let's see if I can skip some of this.
4 Well, the article goes on to say in the first column
5 of the second page, "A peer review group will keep an
6 eye on carriage levels and deal with stations who fail
7 to meet the minimum 300 hours. If a station has a
8 'reasonable local problem, that prevents it from
9 meeting this goal such as local news events, special
10 fundraisers, or legislative coverage, the peer review
11 group can grant a waiver of a policy', said Bob
12 Ottenhoff" -- I hope I said that right -- "PBS
13 executive VP".

14 Was Ottenhoff a PBS executive VP at the
15 time?

16 A He was.

17 Q And what was the nature of this peer
18 review group that reviewed the local stations for
19 compliance with the carriage rules?

20 MR. RICH: I'm going to interpose an
21 objection at this point. This is totally unrelated to
22 any subject of direct examination. Common carriage,

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1 peer group assessments. I can understand now why Mr.
2 Schaeffer anticipates a full day of cross. He's
3 apparently going to go through everything in the
4 history of the Public Broadcast Service. But this
5 witness' testimony didn't cover this ground at all.

6 MR. SCHAEFFER: This witness has testified
7 -- has testified in his direct, written testimony,
8 that while revenues in the commercial broadcasting
9 sphere are derived from advertising sales tied to
10 program viewership, the financing of public
11 broadcasting operates on entirely different
12 principles. He also said the relationship of public
13 television to the value of particular programming, let
14 alone music's contribution to it, is quite indirect.

15 I think I am establishing that the same
16 considerations for prime-time viewing are applicable
17 to the public broadcasting system, and that's
18 inconsistent with what this witness has said.

19 CHAIRPERSON GRIFFITH: All right.

20 MR. SCHAEFFER: Thank you.

21 CHAIRPERSON GRIFFITH: Overruled.

22 BY MR. SCHAEFFER:

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1 Q What is this peer review group that was
2 keeping -- policing the common carriage rules?

3 A Since that time the peer review group has
4 become what's called the Membership Committee of the
5 PBS Board, made up of PBS Board members.

6 Q Those PBS Board members are typically from
7 the producing stations, are they not?

8 A No.

9 Q Who are they, at the present time?

10 A There are 35 members of the PBS Board;
11 about evenly divided between professionals -- meaning
12 persons in the employ of PBS stations -- and the other
13 half are what we call lay directors -- persons who are
14 voluntarily associated with stations as members of
15 local Boards of Directors. And there are some, so-
16 called general directors who are appointed by the lay
17 and professional directors.

18 Q And who's on the peer review group at the
19 present time?

20 A The membership committee is predominantly
21 professional members of the Board. There are about --
22 I think there are ten members, one of whom is -- no,

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1 there are no members of -- none of the major producing
2 stations is presently represented on that committee,
3 to the best of my recollection.

4 Q Would you consider that a conflict of
5 interest? If they were on?

6 A There are many conflicts inherent in the
7 relationship of PBS and its member stations. And we
8 try to be mindful of that and people recuse themselves
9 when it's appropriate to do so.

10 Q Let's move on. The article goes on to
11 say, otherwise, a non-complying station would be
12 subject to a reign of sanctions which include sending
13 a letter to the station's licensee board, withdrawing
14 program rights, to fining the station 20 percent of
15 its program dues.

16 Was that ever the sanctions that were
17 available against a station that was not complying
18 with the common carriage rules?

19 A Those are the range of sanctions available
20 to the membership committee which now administers or
21 monitors this policy.

22 Q What are program dues?

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1 A Each PBS member station is assessed an
2 annual program assessment, which are the funds PBS
3 uses to acquire programs. That's its program dues.

4 Q I see. And one of the penalties possible
5 if you don't obey the common carriage rules, would be
6 to charge an additional 20 percent, is that correct?

7 A I think that was imagined as the outer
8 limit of what's possible.

9 Q Well, it would be punitive, I assume?

10 A That's correct.

11 Q Then the article goes on to say, the
12 proposed carriage rules yet to be formally approved by
13 the PBS Board, call for cooperation among all stations
14 in meeting two performance goals for dedicated
15 programs, carriage by 90 percent of the stations on
16 the same night and coverage of 90 percent of TV
17 households.

18 Is that the current rule?

19 A That is -- it's not a rule; that's an
20 objective, a goal.

21 Q Well, let's just move on to -- let's see
22 if I can just -- I can finish with this.

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1 MR. SCHAEFFER: Excuse me. I'm next going
2 to ask that a document, Exhibit 516.14 of the original
3 Grajeda group, now be marked as ASCAP 2 for cross
4 examination.

5 JUDGE GULIN: Number 2X.

6 MR. SCHAEFFER: Yes, 2X.

7 CHAIRPERSON GRIFFITH: It will be marked
8 for identification ASCAP Exhibit 2X.

9 (Whereupon, the above-referred
10 to document was marked as ASCAP
11 Exhibit No. 2X for
12 identification.)

13 MR. SCHAEFFER: I'd ask you to read that.
14 I have several questions about this, Mr. Downey. Let
15 me know when you've concluded, and if the Chair will
16 let me know when I can proceed.

17 CHAIRPERSON GRIFFITH: Mr. Schaeffer, let
18 me just inquire while the witness is reading that, do
19 you intend to move these individually or collectively
20 --

21 MR. SCHAEFFER: Yes, I thought I would do
22 it -- whichever -- I move the previous exhibit be put

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1 into evidence.

2 MR. RICH: We object, Your Honor.

3 CHAIRPERSON GRIFFITH: All right. On what
4 basis?

5 MR. RICH: That with the exception of
6 statement attributed to Mr. Downey, they contain
7 hearsay, and at least in one case, examined on double-
8 hearsay; comments attributed to Mobil and Aetna as
9 reported by a Mr. Ozier. The witness testified that
10 he didn't adopt or necessarily agree with the
11 sentiments beyond the fact that they were sentiments
12 of X or Y.

13 So certainly to the extent a newspaper
14 article or a periodical piece purports to come in for
15 the truth of the statements which Mr. Schaeffer
16 attempted to get this witness to adopt and for the
17 most part, this witness did not adopt, at least as to
18 a view that's binding on PBS in this proceeding, I
19 think the document is objectionable.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. SCHAEFFER: One, even if there was a
22 hearsay objection they're obviated in arbitration.

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1 Two, the witness has affirmed the substantial truth of
2 the document, and if they don't think it's true
3 they'll have plenty of time to controvert it. I think
4 he's pretty well ratified most of it, and I don't
5 think what has been said before is a valid objection,
6 even in a court of law.

7 CHAIRPERSON GRIFFITH: Do you have
8 anything?

9 JUDGE DREYFUS: Yes. Is the document
10 being offered for its probative value or are you
11 simply using it as a mechanism to do a cross
12 examination and have the witness' testimony be the
13 evidence?

14 MR. SCHAEFFER: Both. I don't think
15 hearsay is an objection. I've never heard it being an
16 objection in arbitration, and I'd have to say I would
17 be -- I don't know why CARP would be any different
18 than any other -- newspaper articles are regularly
19 used in arbitration. I believe, but that's my view,
20 and therefore I would offer it for both.

21 CHAIRPERSON GRIFFITH: I once sustained an
22 objection Mr. Schaeffer, describing it as rank

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1 hearsay, and someone asked me to define that. It's a
2 bit like cheese, or something, it was so far out.

3 The objection is overruled.

4 (Whereupon, the above-referred
5 to document previously marked
6 as ASCAP Exhibit No. 1X was
7 received in evidence.)

8 BY MR. SCHAEFFER:

9 Q Have you finished reading, Mr. Downey?

10 A Yes.

11 Q I want to address your attention first to
12 -- let me see no -- sorry, I've lost my place because
13 I was so busy arguing.

14 If you look at the last paragraph in
15 column 2, there's a quotation attributed to you. I'll
16 read the whole thing. "In earlier years PBS had
17 maintained standard program-use policies but dropped
18 them in 1993 when its Board decided to try to get the
19 best possible rights deals relating to programs
20 purchased for broadcast. Downey recalls 'in the
21 ensuing years, producing stations came to feel ill-at-
22 ease. They didn't know what to expect from any

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1 particular deal. The recent negotiations attempt to
2 give producers more information on the typical
3 division of rights'."

4 Is that a true statement by you?

5 A Yes.

6 Q Now, let's go back to the article itself
7 which says, "four producing stations okay standard
8 contract with PBS". In fact, was there an agreement
9 between PBS and the four so-called, major producing
10 stations that are described in this article?

11 A Before the --

12 Q Well, at the time of the article; around
13 October 1996?

14 A PBS is a membership organization owned --

15 Q I really think I'm entitled to an answer
16 to my question. And I know we're in arbitration but
17 the question is -- let me ask it differently. I
18 withdraw the question.

19 The article reads, "PBS and four of its
20 major producing stations reached agreement October
21 17th of 'template' for future production contracts.
22 PBS president, Ervin Duggan announced to the network's

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1 Board of Directors the next day".

2 Was that true?

3 A There is a template agreement between PBS
4 and these four stations which was preceded by Board
5 policies that proscribed the relationship between PBS
6 and any producer. This template came into effect at
7 about this time, but it's a template that can be
8 ignored by either side.

9 In other words, either side can propose
10 greater or lesser terms or conditions that vary from
11 the template. This was an effort to reduce to a
12 common set of understandings, what our relationships
13 would be, but it's not binding.

14 Q I most respectfully suggest -- I'll move
15 on -- but I do not think that was an appropriate
16 answer to a question that called for a yes or no. By
17 the way, is Mr. Duggan still the president of PBS?

18 A Yes.

19 Q Your experience with Mr. Duggan I am sure,
20 is that he is a truth-teller?

21 A Yes.

22 Q Do you have any reason to believe that the

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1 announcement that Mr. Duggan made on October 17th and
2 described in this first paragraph, was any different
3 than that which is described here?

4 A Is this the -- you're referring to the
5 first paragraph?

6 Q Yes, I am.

7 JUDGE DREYFUS: If you know.

8 THE WITNESS: Well, that continues to be
9 a true statement, if that's what your question is.

10 MR. SCHAEFFER: That's what my question
11 was.

12 BY MR. SCHAEFFER:

13 Q Now, the second paragraph suggests that
14 the template defines a range of formulas for income
15 sharing and the respective program rights of the
16 producing stations according to you. Was that
17 correct?

18 A That's correct.

19 Q And the four stations produced between
20 two-thirds and three-fourths of the PBS prime-time
21 schedule. And then it states that there are four
22 stations: WGBH, Boston; WNET, New York; WETA,

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1 Washington; and KCET, Los Angeles.

2 Was that also true in 1996?

3 A I feel the need to comment that these
4 stations present between two-thirds and three-
5 quarters. They don't necessarily produce all of those
6 programs.

7 Q That's fine.

8 A Okay. Now, then it goes on to say, in the
9 same column -- I'm skipping a bit -- "PBS has been
10 seeking to claim a larger share and greater control of
11 ancillary rights of programs on behalf of member
12 stations who pay a major share of production costs.
13 This is the basis of Duggan's 'station equity model.'"
14 What is the station equity model?

15 A The nature of PBS' relationship with
16 producers has changed over time. As I said a moment
17 ago, many years ago, back in the '70s and '80s,
18 virtually all of PBS' programs came from its member
19 stations. And because of some of the conflicts of --
20 potential conflicts of interest we discussed, our
21 relationship with those producers was established as
22 a -- as board policy. That's the way in which the

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1 relationship between vendor and client was -- was
2 overseen or managed.

3 As we entered the 1990s, and PBS began
4 doing business with -- contracting with companies
5 external to public broadcasting, those board policies
6 were no longer a rational way to do business with a
7 third party independent, even potentially for-profit
8 company.

9 And so we sought to change the way in
10 which our business -- you know, practices and
11 structure. And in the course of that, the other point
12 I'd make is that policies made in 1980 were in many
13 ways irrelevant, given the changes of technology over
14 time. There was no home video industry in 1980, but
15 we had to take that into account in these new
16 relationships. And so this was an effort to put our
17 relationship with the producers on a more rational
18 business-like footing.

19 Q Isn't it a fact that in 1996 the station
20 equity model was presented as a way of getting
21 substantial new revenues for PBS?

22 A I'm sorry. I didn't really answer your

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1 question. The station equity model is a deliberate
2 effort on PBS' part to identify sources of revenue for
3 programming that is -- that are external to the
4 stations themselves from third parties.

5 Q And that program was commenced in 1996
6 under Mr. Duggan's stewardship, wasn't it?

7 A That is correct.

8 Q So that's kind of a change in the way PBS
9 and the public broadcasting -- withdrawn.

10 That's kind of a change in the way that
11 PBS and the public television stations are going to do
12 business for the future, isn't that correct?

13 A It's -- "change" isn't quite the right
14 word. It is an added dimension, not a --

15 Q "Change" isn't the right word?

16 A Well, it's -- I don't want to leave the
17 implication that everything we do now is -- is unique
18 and different somehow.

19 Q But didn't -- sorry. Did you finish your
20 answer?

21 A That we added the -- we have always sought
22 funding from third parties. Underwriters are third

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1 parties. But this was a more -- a focused effort to
2 find strong media partners with whom to collaborate in
3 the production of programming for distribution on PBS.
4 That's -- that's the new part, and that is an add-on
5 to what we do, not a --

6 Q Well, I don't want to dwell on this,
7 because we're going to go into this a little later.
8 But isn't this something that Mr. Duggan -- is it
9 Duggan or Dugan (phonetic)? I'm sorry.

10 A Duggan.

11 Q -- Duggan takes great pride in describing
12 that under his stewardship in 1996, the station equity
13 model was conceived.

14 A Yes.

15 Q Isn't that correct?

16 A That is correct.

17 Q And why is it called the station equity
18 model?

19 A The point we were trying to convey to
20 stations in the -- in the naming of this was -- you
21 know, prior to that time, PBS' essential practice was
22 to rent programs, if you will, to pay the license fee

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1 to a producer for a limited right to exhibit the
2 program on PBS only, and then the program would, you
3 know, migrate off to wherever it would go.

4 The reality, however, was that the license
5 fees PBS was paying was often equal to the entire cost
6 of producing the program, and we believe that the
7 stations were, therefore, being shortchanged, and that
8 the stations ought to get a greater return on their
9 investment if they are paying virtually the full cost
10 of producing a program, or proportionately a greater
11 return on whatever their investment was. The rules
12 prior to that, or the policies prior to that, really
13 did not produce that -- that result.

14 Q It's more businesslike to do it the way
15 you're doing it under the station equity model, isn't
16 it?

17 A Yes.

18 Q Now, let's go back to the -- this column,
19 because we were on common carriage, and I apologize
20 for having been distracted. At the bottom of the
21 first column, Mr. Downey, if you'll follow with me, it
22 says, "Most stations that sought the template did not

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1 sign it in the end, however. The 15 large stations of
2 the community station resource group originally asked
3 PBS to create a standard formula for production
4 contracts, but 11 did not accept the final product.

5 "The sticking points, reportedly, were
6 provisions inserted by PBS during summer negotiations
7 that signatory stations would become leaders in
8 encouraging common carriage of programs and co-
9 branding joint use of the PBS logo and their own
10 station logos." Was that true?

11 A I can't tell you why some stations elected
12 not to sign or become signatories to this template
13 field.

14 Q Did they ever -- was it ever suggested to
15 you by anyone that that was true, other than this
16 article?

17 A Yes.

18 Q Who suggested it?

19 A I can't recall.

20 Q But a number of people did, didn't they?

21 A There are anecdotes.

22 Q Okay.

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1 A There are lots of -- of motives and
2 missions involved here.

3 Q Of course, you don't know what went on in
4 people's minds, but you do know what you were told,
5 and that was one of the things you were told, wasn't
6 it?

7 A That's one of the things I was told.

8 Q Let's move on.

9 MR. SCHAEFFER: Would you -- I'm going to
10 move that the ASCAP 2X be in evidence.

11 MR. RICH: Your Honors, I confess to being
12 somewhat confused again about the basis on which these
13 are both being offered and, at least as to 1X,
14 admitted into evidence.

15 Again, there are numerous statements
16 attributed to third parties which this witness doesn't
17 adopt, and I hope and trust that the documents are not
18 being admitted, to the extent they are, for the truth
19 of those statements, which again he -- his last
20 answer, he absolutely distances himself from certain
21 sentiments of third party stations here.

22 CHAIRPERSON GRIFFITH: I understand.

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1 Mr. Schaeffer?

2 MR. SCHAEFFER: Again, this is a hearsay
3 objection, which I believe is inappropriate here. In
4 fact, he ratifies most of the things that are said
5 anyway, and I believe it's appropriate for the Panel
6 to consider it. The Panel is perfectly capable, in my
7 view, of weighing the value of these articles. And if
8 it thinks they're not good in view of his testimony,
9 they'll do so. It's just a question of getting over
10 the threshold and letting him consider it.

11 MR. RICH: But for Mr. Schaeffer, with
12 respect to use this cant about there is no such thing
13 as a --

14 MR. SCHAEFFER: I object to that.

15 MR. RICH: -- it --

16 CHAIRPERSON GRIFFITH: Go ahead.

17 MR. RICH: -- doesn't address the central
18 concern, which is by definition we are not going, I
19 suppose, in this proceeding to be calling, in
20 connection with 2X, Frederick Breitenfeld, whose name
21 appears at the top of the second column, or Mr.
22 Griffiths, whose name appears at the bottom of the

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1 first column. And whether or not the hearsay --
2 that's the whole purpose of the hearsay rule.

3 We have no basis for testing the validity
4 of the statement. And particularly where this witness
5 doesn't subscribe to its validity, the idea of simply
6 saying, "Oh, there's no hearsay rule," and indirectly
7 attempting to get it in for the validity of hundreds
8 of statements -- by the time Mr. Schaeffer is done,
9 I'm sure, today -- attributed to third parties seems
10 to me absolutely going to dilute the value of
11 testimony of witnesses in this proceeding.

12 MR. SCHAEFFER: The remedy for Mr. Rich,
13 who I assume will apologize for using the word "cant,"
14 the remedy seems to be to ask his witness on redirect
15 if he believes some statement that he doesn't like is
16 true or untrue. But it seems to me that is not a
17 ground for the Arbitrators not considering this
18 material.

19 We are up against a very difficult problem
20 here, I might say. We are trying to prove -- and we,
21 I believe, will prove to you -- that PBS and the
22 public stations are a different animal than they were

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1 a long time ago. We don't have the benefit of
2 depositions. we don't have the benefit of subpoena
3 power. and we have a limited amount of tools in that
4 effort.

5 One of the good ways of doing this is
6 relying, to some extent, on periodicals that this
7 particular witness has already confirmed are accurate
8 periodicals. But that's why in arbitration there is
9 no hearsay rule.

10 CHAIRPERSON GRIFFITH: I'm sorry. Mr.
11 Kleinberg, we have totally ignored you, sir. Do you
12 have any comments?

13 MR. KLEINBERG: As usual, I do.

14 (Laughter.)

15 But I would echo Mr. Schaeffer's comments,
16 and I'll only add this. And this is one of the more
17 interesting aspects of this proceeding. The licensees
18 -- people who are receiving the compulsory licenses
19 under the statute -- are the stations, not public
20 broadcasting services.

21 And it is, indeed, sort of like boxing
22 with your hands behind your back to have the actual

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1 licensees not here, not called as witnesses, not
2 subpoenaable, not deposable, not discoverable, and then
3 be told we can't have any information that comes from
4 them or is about them into the proceeding.

5 I suggest that, as Mr. Schaeffer stated,
6 the Panel is perfectly capable of weighing the
7 articles or any of the evidence in the case. But to
8 say because it's hearsay under some formalistic rule
9 is a little bit ignorant of the facts that we have to
10 deal with here.

11 And I might note that public broadcasting
12 themselves have included articles within their melange
13 of evidence. So I think it's perfectly appropriate to
14 let them in.

15 CHAIRPERSON GRIFFITH: All right.

16 MR. RICH: I believe we -- to correct the
17 record, I'm not aware that we have, in even a single
18 instance. We refrain from polluting the record with
19 hearsay, and the documents we cross examined ASCAP,
20 for example, on were admissions by ASCAP contained in
21 court filings and the like.

22 And I just think we're going down a road

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1 here that -- with respect -- and obviously, it's the
2 Panel's judgment -- that if we have hundreds of
3 documents of the nature of Current magazine quoting
4 everybody imaginable on a subject, I don't think it's
5 -- there's no possible way I can meaningfully cross
6 examine news articles dealing with quotes from third
7 parties.

8 I think it would be perfectly legitimate
9 to probe this witness' knowledge, his understanding,
10 from as many documents as you want, which Mr.
11 Schaeffer is clearly doing and intends to keep doing.
12 I couldn't and don't object to that.

13 But to then say because there is
14 supposedly no hearsay rule that these documents come
15 in subject to my having an ability presumably to test
16 the voracity of third party comments -- and I don't
17 know the first thing about these people -- seems to
18 place an unfair and inappropriate burden on our
19 clients.

20 MR. SCHAEFFER: I can't resist. I don't
21 want to extend this, but the people he is talking
22 about we can't probe are the people that they

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1 represent, and Ms. Jamison, at page 3 of her direct
2 testimony, says they represent.

3 CHAIRPERSON GRIFFITH: All right. Thank
4 you. Give us just a moment, please.

5 All right. The objection is overruled.
6 We simply want to state for the record, and for the
7 benefit of counsel as well, while we recognize that
8 hearsay is contained in this document, we feel that
9 the Panel is capable of determining what is hearsay,
10 what is triple hearsay, what have you, and we will
11 accord it which weight that we feel is appropriate.

12 And we also feel that we are capable of
13 determining which items contained in the various
14 articles the witness has agreed to, or which he has --
15 does not agree with, from his testimony and his
16 evidence. Hearsay, technically, is admissible. We
17 have to agree with that.

18 MR. SCHAEFFER: May I move on?

19 CHAIRPERSON GRIFFITH: Yes. And get right
20 to the --

21 MR. SCHAEFFER: I'll try. The next
22 problem won't be hearsay. I'm going to ask that there

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1 be produced to the witness -- and I'm going to --

2 CHAIRPERSON GRIFFITH: Well, let me ask
3 just -- did you move this?

4 MR. SCHAEFFER: I had moved 2X, yes.

5 CHAIRPERSON GRIFFITH: ASCAP Exhibit 2X is
6 admitted, then, into evidence. Thank you.

7 (Whereupon, the above-referred
8 to document, previously marked
9 as ASCAP Exhibit No. 2X for
10 identification, was received in
11 evidence.)

12 MR. SCHAEFFER: I'm next going to ask that
13 there be directly moved -- I'm going to move it into
14 evidence -- and I understand there is no objection to
15 it from Weil, Gotshal -- a PBS statement which we
16 printed off PBS' web site and dated January 28, 1998.
17 I would ask that it be admitted in evidence, since
18 there can't be any question but that it's an
19 admission, as ASCAP 3X. And I have some questions for
20 the witness.

21 (Whereupon, the above-referred
22 to document was marked as ASCAP

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1 Exhibit No. 3X for
2 identification.)

3 MR. RICH: May I ask Mr. Schaeffer in
4 terms of -- was this previously denominated with an
5 exhibit number?

6 MR. SCHAEFFER: No. We just printed it
7 off line after -- and you'll note the date is
8 January 28, 1998.

9 MR. RICH: So your statement that we
10 didn't object to --

11 MR. SCHAEFFER: I'm sorry. I apologize --

12 MR. RICH: -- is based on the fact that we
13 had never seen this document.

14 MR. SCHAEFFER: I apologize, Mr. Rich. I
15 do apologize.

16 MR. RICH: I'd like a chance to read it.

17 CHAIRPERSON GRIFFITH: All right.

18 MR. SCHAEFFER: You certainly can.

19 And while he's doing that, maybe the
20 witness could look at it also and save some time.

21 MR. RICH: If I may react --

22 CHAIRPERSON GRIFFITH: Yes, please.

1 MR. RICH: -- Mr. Chairman. Our position
2 has been with respect to materials appearing on the
3 web sites of PBS, NPR, and CPB, that where the
4 information appearing is authored by one of those
5 entities we have no objection. It's impossible,
6 looking for the first time at this document now, to
7 know whether this document so qualifies, or rather
8 whether it is a republication of a third party article
9 that may have been carried.

10 There is no byline. There is no source of
11 authorship, and sitting here at this moment,
12 therefore, I'm not in a position to evaluate whether
13 this truly is an authored by PBS document or
14 otherwise. Perhaps the witness can illuminate that.
15 But without that knowledge, I'm not in a position to
16 do other than lodge an objection, at least pending
17 learning a bit more about the provenance of the
18 document.

19 CHAIRPERSON GRIFFITH: All right.

20 Mr. Schaeffer?

21 MR. SCHAEFFER: Yes. Without responding,
22 because maybe we can save --

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1 BY MR. SCHAEFFER:

2 Q Mr. Downey, isn't this a PBS press
3 release?

4 A Actually, the PBS Sponsorship Group is
5 separately incorporated.

6 Q I didn't ask you that. Isn't this
7 something that was released by PBS? If you look in
8 the lower left-hand corner, don't you see that? PBS
9 org, inside PBS news, second quarter?

10 A Evidently, it was on the PBS web site.

11 Q Yes.

12 A But you asked me -- that's not what you
13 asked me. You asked me, is this a PBS document? And
14 there -- as I said, and mindful of your colloquy a
15 moment ago, this may have, in fact, been authored by
16 the Sponsorship Group which is separately
17 incorporated.

18 Q And carried by PBS on its web site?

19 A That is true.

20 MR. SCHAEFFER: I submit that if PBS has
21 put something on its web site, it has adopted it
22 sufficiently for it to be substantive evidence.

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1 MR. RICH: We have no objection to this
2 document.

3 CHAIRPERSON GRIFFITH: All right.

4 MR. SCHAEFFER: Let me move on, then.

5 CHAIRPERSON GRIFFITH: It will be received
6 as ASCAP Exhibit 3X.

7 (Whereupon, the above-referred
8 to document, previously marked
9 as ASCAP Exhibit No. 3X for
10 identification, was received in
11 evidence.)

12 BY MR. SCHAEFFER:

13 Q Do you know why this is -- do you have an
14 understanding as to the reason why this is dated from
15 Pasadena, California, on January 8, 1998?

16 A Yes.

17 Q What is that?

18 A Semiannually, PBS participates in what is
19 commonly referred to as the Press Tour. It's a
20 gathering in the Los Angeles area of the television
21 press critics for the purpose of looking at new
22 programming for the upcoming season or six-month

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1 period, and that was held in -- the Television Critics
2 Association actually organizes this tour, and it was
3 held in Pasadena this past January.

4 Q Now, the PBS Sponsorship Group that is
5 listed -- that is set forth in the first sentence of
6 this document, that's the group of stations that we
7 previously referred to in your earlier testimony?
8 Well, let me withdraw it. Withdrawn.

9 What's the PBS Sponsorship Group?

10 A The PBS Sponsorship Group is a nonprofit
11 corporation that consists of representatives from or
12 it represents four public television stations and PBS.

13 Q And those are the four major producers
14 that were previously referred to?

15 A Yes.

16 Q KCET and WNET, WGBH --

17 A Yes.

18 Q -- and the Washington station?

19 A Yes.

20 Q And why is it called the Sponsorship
21 Group?

22 A This group banded together and formed the

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1 Sponsorship Group to try to improve the efficiency, I
2 guess, and the effectiveness of these stations and
3 PBS' fundraising efforts.

4 Q Its explicit job is to go out and get
5 corporate underwriting, isn't it?

6 A So far, it has focused on corporations,
7 but it will be expanding to include government and
8 foundation underwriting as well.

9 Q Well, of course, the first sentence of
10 this says, "The PBS Sponsorship Group, public
11 television's up and coming corporate sales and support
12 force, attracted \$7.5 million in new program
13 sponsorships during its second quarter which ended
14 December 31, Ervin S. Duggan, PBS President and Chief
15 Executive Officer, announced today." Do you have any
16 reason to believe that an announcement by Mr. Duggan
17 that's carried on PBS' web site is inaccurate?

18 A No.

19 Q So that Mr. Duggan described this as an up
20 and coming corporate sales and support force. Do you
21 think he was mistaken in so describing it?

22 A I don't think I suggested he was mistaken.

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1 I said --

2 Q I --

3 A -- in the future, it is anticipated this
4 group will undertake federal and foundation and
5 grant --

6 Q But for the present -- that is, in 1998 --
7 it's concentrating on corporate, and that's why it's
8 called the corporate sales and support force, isn't
9 that right?

10 A That's correct.

11 Q Thank you.

12 And it is true, in fact, that during the
13 second quarter ended December 31, the PBS Sponsorship
14 Group did attract \$7.5 million, isn't that correct?

15 A I believe this to be truthful. I don't
16 independently know.

17 Q And it's interesting it's called
18 sponsorships, and it's called the Sponsor Group. Is
19 that because the underwriters from whom it was seeking
20 money are really sponsors? Isn't that why it's called
21 the Sponsorship Group?

22 A Well, the term "sponsor" is in common use

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1 in the area of philanthropy. It's a term to describe
2 the person who supplied the money, and I think this
3 group felt it was a better term than underwriter or
4 supporter or patron.

5 Q Isn't it your understanding the word
6 "sponsor" is frequently used in commercial
7 broadcasting as well?

8 A Yes.

9 Q And what is your understanding of the word
10 "sponsor" to mean in commercial broadcasting?

11 A A person who pays for an advertisement.

12 Q I see. And then this goes on -- Mr.
13 Duggan goes on to say, "In its six-month existence,
14 the PBS Sponsorship Group has brought in \$11.5 million
15 in corporate support." That's true also, isn't it?

16 A I will take this at face value, yes.

17 Q And it then goes on to list, in the second
18 paragraph, certain programs that are -- got corporate
19 -- that were the recipient of corporate funding. But
20 I want to point out to you, the last sentence says,
21 "The sponsors include Polaroid, Delta Tools, Lilipons
22 Water Gardens, Porter Cable, and Thompson-Minwax

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1 Company. Additional underwriting partners will be
2 announced soon."

3 So that would indicate, would it not, that
4 at least in 1998, as opposed to, say, 1980, or
5 something like that, PBS is treating underwriting
6 partners as sponsors, is that correct?

7 A Well, as I said a moment ago,
8 "sponsorship" is a term used in philanthropy to mean
9 a party that contributes money voluntarily to -- for
10 some good work. It is also used in commercial
11 broadcasting in a somewhat different context, which,
12 as I said a moment ago, is somebody who pays for an
13 advertisement. Now --

14 Q Now --

15 A -- I think you have to be mindful that --
16 that there are different uses of the term.

17 Q Now, with respect to the PBS Sponsorship
18 Group -- then I'll leave this alone for a minute -- do
19 you have an understanding that they have any --
20 withdrawn.

21 Your understanding is that they are going
22 to go on and continue trying to attract corporate

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1 support, isn't that correct?

2 A That is their purpose, yes.

3 Q Just forgive me. I may be able to save a
4 little --

5 A Oh, okay.

6 Q I think I'm going to just put this aside.
7 I'll move on to the next one.

8 Do you have any -- is there something
9 called PBS National Program Funding Standards and
10 Practices?

11 A Yes.

12 Q What is that?

13 A They are more familiarly known as the PBS
14 Underwriting Guidelines. It's the rules and
15 regulations that apply to the -- both the acceptance
16 of corporations as underwriters of particular
17 corporation foundations and others, as underwriters of
18 particular programs, as well as the rules that apply
19 to the actual announcement that goes on the air.

20 Q And what is your -- do you have any
21 current role with respect to those guidelines? I'll
22 call them guidelines. It's easier.

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1 A Yes.

2 Q What's your role?

3 A I'm in charge of them, I guess you could
4 say.

5 Q Are there amended from time to time?

6 A They are.

7 Q When was the last time they were amended?

8 A Last Friday.

9 Q And that was amended by the PBS Board?

10 A Yes.

11 Q Well, I'll get to that in a minute.

12 That's news to me. But, then again --

13 MR. SCHAEFFER: I'm going to ask that a
14 copy of the document as it existed February 2, 1997,
15 which is what I received from Mr. Rich the other day,
16 be marked as ASCAP Exhibit 4X.

17 (Whereupon, the above-referred
18 to document was marked as ASCAP
19 Exhibit No. 4X for
20 identification.)

21 MR. RICH: I won't object to this
22 document. I will note the irony, however, of the fact

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1 that I had proposed to Messrs. Schaeffer and Kleinberg
2 a week ago that given the obvious intention of ASCAP
3 and/or BMI to explore this area, that I be permitted
4 to adduce this on direct examination and was met with
5 a rebuff from BMI's counsel to the effect that it was
6 not supported by any written direct testimony.

7 Talk about sauce for the goose and gander.
8 It's obvious that apparently the view of ASCAP -- and
9 I assume BMI -- as to what's relevant on cross is not
10 bounded by direct, except where I would define direct
11 in a fashion that would encompass the same documents.
12 I'm totally baffled by this.

13 However, since I think this is an
14 important subject, which I believe is relevant to the
15 Panel -- and notwithstanding ASCAP's and BMI's own
16 position that it exceeded the bounds of the direct
17 examination -- I won't object either to the admission
18 of this document in evidence or to cross examination
19 on it, with the full understanding that on redirect
20 I'll have a full and ample opportunity to add such
21 questioning of the witness as is appropriate to put it
22 in the proper context.

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1 MR. SCHAEFFER: I only respond for myself
2 because I'm sure Mr. Rich has spoke. I have never
3 objected, nor did I rebuff in any way, Mr. Rich, your
4 proposal. It was entirely my co-counsel, and you
5 never asked me -- you were supposed to call me on
6 Friday afternoon at 5:00. You didn't choose to do so.

7 MR. RICH: Having received a letter from
8 BMI --

9 MR. SCHAEFFER: But not from me. But not
10 from me, Mr. Rich, because I had no opposition to it.
11 I mean, I just want to go on record as saying I have
12 not done that, and I think Mr. Rich --

13 CHAIRPERSON GRIFFITH: If I understand,
14 the issue that the Panel is particularly concerned
15 with at the moment is you do not object, so,
16 therefore, the document is admitted as ASCAP's Exhibit
17 4X.

18 (Whereupon, the above-referred
19 to document, previously marked
20 as ASCAP Exhibit No. 4X for
21 identification, was received in
22 evidence.)

1 MR. RICH: We do not object.

2 CHAIRPERSON GRIFFITH: Thank you.

3 MR. SCHAEFFER: Thank you.

4 JUDGE GULIN: If I may also make a moment.

5 I think it would be more appropriate for counsel to
6 direct their comments to the Panel --

7 MR. SCHAEFFER: I would --

8 JUDGE GULIN: -- rather than engage in
9 colloquy.

10 CHAIRPERSON GRIFFITH: All right.

11 MR. SCHAEFFER: I apologize if I have done
12 that. But the fact of the matter is that I believe --

13 JUDGE GULIN: I understand.

14 BY MR. SCHAEFFER:

15 Q This is, I take it -- 4X, I take it, is
16 the guidelines as of February 2nd. Just in the
17 interest of expediency, what changes were made?

18 A We frequently make what I'll call
19 housekeeping changes from time to time. For example,
20 the -- not so long ago the FDA changed its regulations
21 with respect to television advertisements involving
22 prescription pharmaceuticals that necessitated a

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1 change -- a conforming change to our guidelines.

2 And the most recent change actually
3 involved sponsorship again. The Board affirmed that
4 the term "sponsored by" is not appropriate for use on
5 PBS, but did allow, under certain circumstances, the
6 noun "sponsor" or "sponsorship" may be used.

7 Q Was there also a change in the frequency
8 in which a sponsor or underwriter could -- withdrawn.

9 Was there also a change involving the
10 multiple sponsors or multiple underwriters having
11 their names set forth in a given period of time?

12 A I'm sorry. I don't understand.

13 Q Isn't it a fact that there was a change
14 that formally -- if there were two or three sponsors
15 or underwriters, their names had to be set forth in a
16 limited period of time consecutively?

17 A The --

18 Q Why don't you tell us about that change.

19 A Yes. The -- I believe it was this most
20 recent --

21 Q Yes.

22 A -- or this February document where for the

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1 first time the policy states that the underwriting --
2 I'll call it pod, P-O-D, the period of time develop --
3 devoted to -- on the underwriting messages of a
4 program -- can be up to a minute in length, where it
5 previously had been 30 seconds.

6 Q And when you say "the pod," what do you
7 mean by "the pod"?

8 A Well, we put all of our underwriting
9 announcements together. If there are two underwriting
10 announcements in a program, they have to be back to
11 back or --

12 Q I see.

13 A -- three or four or six or however many
14 there are. They have to go together in a package or
15 a pod.

16 Q And how has this changed? I'm sorry. I
17 don't understand.

18 Q What's the new change?

19 A One of the -- one of the phenomena we are
20 experiencing is that it's less often that -- well,
21 it's more -- it's more frequently the case that we
22 have to have -- we end up with more underwriters in a

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1 program, two or three or four, rather than one or two.
2 And so it was necessary to expand the amount of time
3 available for underwriting announcement.

4 Previously, 30 seconds was the limit,
5 although there are always exceptions that can be
6 granted in unusual circumstances. But we expanded
7 that limit to one minute.

8 Q Does that mean now that the intervals
9 between the announcements for the underwriters can be
10 increased?

11 A The intervals between -- do you mean --

12 Q Between the particular announcements of
13 the particular underwriter or the particular sponsor.

14 A Well, any single announcement can be up to
15 15 seconds.

16 Q So --

17 A And the total -- and the total of all of
18 the announcements can be up to 60 seconds. So you
19 could have four 15s or --

20 Q Or any combination or --

21 A Right.

22 Q -- interval in between.

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1 A I'm not sure what you mean by "interval in
2 between."

3 Q Well, you could -- for example, one
4 sponsor could do 15 seconds at the beginning of 60
5 minutes -- 60 seconds, and the second sponsor at the
6 end do 15 seconds, which would give a -- maybe a
7 matter of attention -- maybe you wouldn't have so much
8 confusion. They wouldn't be back to back. Isn't that
9 correct?

10 A Well, I think -- a careful reading of this
11 I think will still -- will show that the -- they are
12 supposed to be identified in the -- in the descending
13 order of their contribution.

14 Q I see. So it's a matter of how much they
15 pay?

16 A Well, we acknowledge the -- the largest
17 contributor first, and the next largest second, and so
18 on.

19 Q Incidentally, you've doubled, then, the
20 advertising -- withdrawn.

21 You've doubled the time that's devoted to
22 underwriters' announcements, isn't that --

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1 A We've doubled the maximum amount of time
2 allowable but not necessarily -- every program doesn't
3 necessarily have two or more underwriters.

4 Q Well, if the underwriter insists, though,
5 it could be now 60 seconds as opposed to 30 seconds.

6 A No, no, no. It has nothing to do with
7 underwriters insisting.

8 Q Whose insistence is it?

9 A It's the producer who -- and PBS who
10 determine what the content of the underwriting
11 announcement will be.

12 Q And it's the producer who gets the money
13 from the underwriter for the show, isn't that right?

14 A Unless it's the PBS Sponsorship Group.

15 Q Isn't that correct?

16 A Yes.

17 Q And if the underwriter says it's a
18 condition of giving you money, "I want more time
19 rather than less," one would anticipate the producer
20 might be amenable to that?

21 A Well, the amount of time is, as I said,
22 maximum 15 seconds. And to the extent we're able to

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1 produce -- there is no kind of formal rule that for
2 one million you get this, and two million you get
3 that, or 100,000 you get the other. And so that is
4 managed by the producers with input from PBS, frankly,
5 to try to keep the time down to a minimum.

6 Q Now, look at C1 and 2. I just want to see
7 if I understood that correctly. That's policy
8 application. Do you see where I'm talking about?

9 A On page 2?

10 Q On page 2. You're familiar with that
11 section, aren't you?

12 A Yes.

13 Q Now, what is the difference between policy
14 application by PBS and by PBS member stations? What's
15 that all about?

16 A These are the guidelines that PBS uses in
17 the course of business with respect to programs
18 distributed by PBS. However, the Board of Directors
19 has encouraged all stations to adopt this -- the
20 essence or the sense of these guidelines in their
21 local operations.

22 Q But it also says, does it not,

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1 "Nevertheless, producers and funders should be aware
2 that individual judgments may differ in a given
3 situation, even when the same policies are being
4 administered, and that individual public television
5 licensees may administer local program underwriting
6 policies that vary from these policies." Do you see
7 that?

8 A Yes.

9 Q Doesn't that mean that the PBS membership
10 stations can pretty well do what they please, subject
11 to FCC regulations?

12 A The members stations can absolutely do
13 what they please, subject to FCC regulations.

14 Q So these guidelines are really guidelines
15 that PBS recommends but are not binding on the local
16 stations, isn't that correct?

17 A That is correct.

18 Q They are kind of -- do you know the word
19 "precatory"?

20 A Yes.

21 Q Thank you.

22 Now, I wanted to go over some of them. So

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1 formally, the credits may be 15 seconds long and
2 appear at the beginning and end of the particular
3 program, correct?

4 A Yes.

5 Q But now that has been changed somewhat,
6 hasn't it? Can they be --

7 A No.

8 Q -- longer?

9 A Not long -- well, any individual message
10 can be up to 15 seconds.

11 Q So you could have more messages?

12 A The aggregate cannot exceed 60 seconds.

13 Q So you might now have two sponsors --
14 excuse me -- two underwriters at the beginning, each
15 15 seconds, and two underwriters, two sponsors at the
16 end for 15 seconds. Is that correct?

17 A No.

18 Q Well, then, I don't understand.

19 A Under these policies -- first of all,
20 underwriting credits appear at the beginning and the
21 end of the program.

22 Q Right.

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1 A There are some exceptions to that, but for
2 these purposes assume beginning and end. One minute
3 -- a one-minute interval is allowed at the beginning,
4 and a one-minute interval at the end, up to one
5 minute. It's not required that it be one minute.

6 And within that one minute, you are
7 obliged to identify all of the third parties who have
8 contributed to the cost of this production. Any
9 single announcement cannot exceed 15 seconds. You
10 could have a maximum of four 15-second announcements,
11 or six 10-second announcements, or 60 one-second
12 announcements, but that's all you can have.

13 Q I understand. Now, what are the
14 exceptions you just referred to?

15 A It'll take me a minute to find it. Maybe
16 you know where it is.

17 Q I don't.

18 MR. RICH: While the witness is looking,
19 I just would observe he's been on cross examination --

20 MR. SCHAEFFER: Want to take a break?

21 MR. RICH: -- without a break for a
22 considerable time. I don't know what the Panel's

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1 intention is, or Mr. Schaeffer's, for a lunch break.
2 And maybe we can inquire of the witness if he's
3 content to proceed with --

4 CHAIRPERSON GRIFFITH: Mr. Downey --

5 MR. SCHAEFFER: Whatever your pleasure.

6 CHAIRPERSON GRIFFITH: -- do you need five
7 minutes, or lunch?

8 THE WITNESS: In a few minutes would be
9 appropriate. We don't have to do it this minute.

10 CHAIRPERSON GRIFFITH: Why don't we take
11 just five minutes right now, and then --

12 MR. SCHAEFFER: Sure.

13 CHAIRPERSON GRIFFITH: -- we'll come back
14 and --

15 MR. SCHAEFFER: Great.

16 CHAIRPERSON GRIFFITH: -- take our lunch
17 break at 1:00 or --

18 MR. SCHAEFFER: Yes, I'll be going on the
19 afternoon. There's no doubt.

20 CHAIRPERSON GRIFFITH: All right.

21 (Whereupon, the proceedings in the
22 foregoing matter went off the record at

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1 12:30 p.m. and went back on the record at
2 12:38 p.m.)

3 CHAIRPERSON GRIFFITH: Mr. Schaeffer and
4 Mr. Rich, and other counsel and parties, why don't we
5 try to go until 1:15 to avoid some of the kids up
6 there who --

7 MR. SCHAEFFER: Swell.

8 CHAIRPERSON GRIFFITH: -- are here to see
9 the cherry blossoms.

10 MR. SCHAEFFER: Swell. That would be
11 swell.

12 CHAIRPERSON GRIFFITH: And I'll recommend
13 to all of you that --

14 (Laughter.)

15 MR. SCHAEFFER: It's nice to see a
16 facility so much used.

17 CHAIRPERSON GRIFFITH: Yes. Please.

18 BY MR. SCHAEFFER:

19 Q You've testified, I think, that under PBS
20 guidelines credits can be no longer than 15 seconds,
21 is that correct?

22 A Any single credit.

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1 Q Yes, single -- I meant a single credit.
2 I'm sorry. Thank you.

3 In fact, though, isn't it a fact that many
4 of the stations in the United States allow
5 announcements for up to 30 seconds, which is the FCC
6 guideline?

7 A It's my understanding there is perhaps two
8 dozen of the 175 who have, to some extent or another
9 -- and it depends on the content of the message -- but
10 allow underwriting credits of 30 seconds duration,
11 yes.

12 Q Sitting here today, could you tell us the
13 approximate market share of the stations you've just
14 described that do allow 30 seconds, what cities they
15 are in? One of them is Houston, isn't it?

16 A I believe that's correct.

17 Q Any others that you can think of in fairly
18 big cities in the United States?

19 A These stations tend to be major market
20 stations, but it's not -- it's not every major market.
21 Washington, D.C., for example, does not accept 30
22 seconds.

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1 Q Well, what do you mean by a "major market
2 station"?

3 A Larger markets, like New York does, but
4 Boston and Washington don't, Houston does, Dallas
5 does. San Francisco allows, to a limited extent, 30-
6 second announcements, particularly for foundations.
7 It varies from market to market, but it's more
8 frequently found in large cities than small.

9 Q And the 30-second limit is a function of
10 the FCC's regulations, isn't it?

11 A No.

12 Q No?

13 A The Commission has never -- at least
14 insofar as noncommercial television is concerned, has
15 never stated any length as being too long or too
16 short. The Commission allows public television
17 stations -- well, with respect to programs, Section 17
18 -- 317 of the Commission's regulations requires that
19 we disclose third party funding. That is, the
20 underlying, you know, reason for underwriting credits.
21 The Commission has never stated any particular length
22 as being acceptable or unacceptable.

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1 In addition, local stations who accept
2 contributions from corporations to support, for
3 example, the cost of daily operations are permitted by
4 the Commission to announce that fact, to give credit
5 to those corporations on the air in the form of what
6 are called "local support announcements" or "day part
7 announcements" or "general support announcements," and
8 those are local underwriting messages.

9 They may be of, you know, very brief
10 duration. They may be up to 30 seconds. I believe
11 there are some that have been longer than 30 seconds.

12 Q You said that the reason for underlying
13 credits is disclosure of who paid for a particular
14 program. But from a number of the underwriters or now
15 called sponsors, from their point of view, one of the
16 reasons for giving them credit is to get credit, isn't
17 it, with the community or with their customers or with
18 the audience?

19 A That may be one of the motives, yes.

20 Q But you don't have any serious doubt that
21 for a number of major American corporations part of
22 their motivation for giving underwriting grants is to

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1 get their name in front of the audience -- there's no
2 doubt about that in your mind, is there?

3 A That is true for some corporations, yes.

4 Q All right. I'm not going to ask you to --
5 by the way, has there ever been a study made by your
6 -- by PBS or CPB of the motivation of the American
7 corporate community to give underwriting?

8 A I can't recall a specific study. There is
9 lots of anecdotal evidence, but I don't recall a
10 specific study.

11 Q It is true, is it not, that under even
12 your -- and I say "even" -- under the PBS guidelines,
13 a corporate underwriter or a sponsor can use its
14 corporate symbol or trademark, isn't that correct?

15 A The Commission's rules specifically permit
16 the use of logograms, yes.

17 Q And you certainly don't -- I'm sorry. I
18 apologize.

19 PBS certainly doesn't suggest that a
20 station should not use a corporate logo or a trademark
21 or a trade name?

22 A That's correct.

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1 Q And, for example, isn't it also true that
2 under your own guidelines corporate slogans can be
3 used, subject to certain limits?

4 A Subject to certain limits, yes.

5 Q For example, you could, if you were Ford
6 Motor Company, say, "Ford Motor Corporation, the maker
7 of the great new Taurus," that would be okay, wouldn't
8 it?

9 A No.

10 Q All right. Well, how about the maker of
11 the new Taurus?

12 A That would be acceptable.

13 Q The difference is the word "great"?

14 A That is correct.

15 Q And could they say, "Ford makes Taurus, a
16 fine car" as opposed to "a great car"?

17 A I think that would be not -- not
18 acceptable.

19 Q Is that something that is debatable, in
20 your view, because somebody might say it's not a
21 comparison? "Fine car" means a good car. It doesn't
22 mean it's better than a Chevy or a Ford. Isn't that

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1 the issue?

2 A There is a great deal of debate about what
3 constitutes a comparative or a qualitative term, which
4 is impermissible.

5 Q Yes. I mean, for example, if Ford said,
6 "Ford Motor Company. We make fine cars," that's not
7 to say that Chevrolet doesn't make fine cars. So that
8 would be permissible, presumably?

9 A Well, again --

10 MR. RICH: Objection.

11 CHAIRPERSON GRIFFITH: Do you want to
12 state the basis for your objection?

13 MR. RICH: This is just counsel's
14 supposition and argumentation with the witness.

15 MR. SCHAEFFER: I'm arguing with an
16 expert --

17 JUDGE GULIN: He has already answered the
18 question. He said "fine" wouldn't be --

19 MR. SCHAEFFER: But I think he may change
20 his mind. That's why I want to --

21 JUDGE GULIN: Well, explore that.

22 MR. SCHAEFFER: Yes.

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1 BY MR. SCHAEFFER:

2 Q Isn't it true that it's comparatives that
3 are prohibited, not the quality of the product itself?

4 A I believe qualitative terms are
5 prohibited.

6 Q Well, for example, isn't "DeBeers, a
7 diamond is forever" often used on underwriting?

8 A I believe that's a -- that is not an
9 underwriting message that has ever been accepted by
10 PBS.

11 Q Could you put a toll number or a web site
12 on your announcement under the PBS guideline?

13 A Until about a year ago, PBS did not allow
14 800 numbers or web site addresses, even though the
15 Commission explicitly permits them. But we changed
16 our policy about a year ago.

17 Q You changed it in 1997, about a year ago?

18 A Yes.

19 Q And I assume that was done because it
20 would encourage underwriting to make that change?

21 A Encourage?

22 Q The making -- allowing an underwriter or

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1 sponsor to put its web site or its toll number on the
2 screen would make it more attractive to that
3 underwriter or sponsor to give money, isn't that so?

4 A There were a couple of reasons.

5 Q Is that one of the reasons?

6 A That's one of the reasons.

7 Q Okay. Now, it is also true that you can
8 have a celebrity's voice making the announcement --
9 for example, Bob Hope in my day, which was important,
10 or Lawrence Welk, but for more modern people maybe
11 Bruce Springsteen or Rock Hudson or -- well, I don't
12 know -- a great movie star. There voice could be
13 heard, right?

14 A We don't allow celebrities, but we do
15 allow a celebrity's voice, so long as the celebrity is
16 not identified.

17 Q But a corporate executive could appear?

18 A Under certain limited circumstances.

19 Q And isn't it true also that some of the
20 stations use celebrities? And I'm thinking
21 particularly of Jonathan Price.

22 A I'm sorry. I can't really speak to what

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1 individual stations may do around the country, at
2 least not in that respect.

3 Q You never that KER has used Jonathan Price
4 as a spokesman for programs?

5 A I was not aware of that, no.

6 Q Okay. All right. Has there ever been any
7 kind of study made of the degree to which local
8 television stations comply with the PBS guidelines?

9 A The only thing that comes to mind is we
10 did at one point ask stations whether they were
11 willing to abide by the PBS guidelines, and I recall
12 that about two-thirds said that they either would or
13 did.

14 Q Was that ever embodied in any report?

15 A I think that was reported to the --
16 really, it's a dim recollection. It was reported to
17 the PBS Board, but I don't recall --

18 Q How long ago was that?

19 A It would be probably back in 1995 when the
20 controversy we were discussing earlier in this Current
21 article was -- was raging.

22 Q Which controversy was that, common

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1 carriage?

2 A The common carriage --

3 Q I see.

4 A The common carriage and underwriting
5 guidelines issues were companion issues that arose at
6 the same time.

7 Q Now, are you acquainted with an
8 organization called APTS?

9 A Yes.

10 Q What is APTS?

11 A America's Public Television Stations is
12 the -- essentially the lobbying group for public
13 television. It manages the relationships with the
14 Congress with the regulatory agencies.

15 Q Is PBS a member of that or --

16 A No.

17 Q -- contributed to that? Is PBS a
18 contributor to APTS?

19 A Not financial contributor, no.

20 Q Does it contribute effort or support?

21 A When we're asked for assistance for, you
22 know, for example, providing data or whatever, yes.

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1 Q You regard that, I assume, as a friend?

2 A We regard APTS as a friend, yes.

3 Q And who supports APTS?

4 A It has -- it is supported to members, just
5 as PBS is. And it's the same stations who constitute
6 the membership of APTS.

7 Q It's kind of a sibling. Is that a fair --

8 A A sister --

9 Q Okay.

10 A -- organization.

11 Q Okay. Now, are you aware that in 1997
12 APTS made some -- started lobbying for some changes in
13 the FCC rules, or not-for-profits?

14 A I'm really not very familiar with that.

15 Q Okay. Is the prohibition on comparable
16 product advertising an FCC restriction, or is that
17 some other kind of restriction?

18 A The Commission's regulations obtaining to
19 -- to advertising do contain specific limitations,
20 such as or including comparatives and superlatives,
21 calls to action, inducements to buy or rent or lease,
22 price information. The PBS guidelines are built on

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1 those but are, at the end of the day, more
2 conservative than what the Commission would allow.

3 Q So that, really, if the FCC changed its
4 rules as to not-for-profits being able to have
5 sponsors make calls to action or use comparative
6 advertising, the local television stations then could
7 go ahead and do those things, isn't that correct --
8 the local public television stations?

9 A That is correct.

10 Q And it has not -- I'm going to put
11 something in front of you. It may not refresh your
12 recollection, but I'm going to put what was marked as
13 Exhibit 713.29 -- and I ask that it be marked for
14 identification.

15 JUDGE GULIN: 5X?

16 CHAIRPERSON GRIFFITH: All right. It will
17 be ASCAP's Exhibit 5X.

18 (Whereupon, the above-referred
19 to document was marked as ASCAP
20 Exhibit No. 5X for
21 identification.)

22 MR. SCHAEFFER: And I'm just going to ask

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1 that it be put in front of the witness to see if it
2 refreshes his recollection as to whether or not there
3 was, in fact, a lobbying effort by APTS in April 21,
4 1997 -- in April 1997 -- to get the FCC to relax the
5 comparative and superlative and call to action
6 restrictions.

7 THE WITNESS: I do recall that.

8 BY MR. SCHAEFFER:

9 Q You do recall that that occurred?

10 A Yes.

11 Q What inspires that refreshed recollection
12 in this document? The first couple of paragraphs?

13 A Yes.

14 Q Okay. And by the way, are you familiar
15 with Electronic Media, the periodical from which this
16 comes, published by Crain?

17 A Yes.

18 Q What is Electronic Media?

19 A It's a periodical having to do with the
20 electronic industry.

21 Q Generally accepted and trade?

22 A I guess. I --

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1 Q Do you know Hatch, by any chance?

2 A I'm sorry?

3 Q Do you know Mr. Hatch, who apparently
4 wrote this article?

5 A No, I don't.

6 Q In any event, it refreshes your
7 recollection that there was an effort by APTS to get
8 the FCC to relax its -- the restrictions of the FCC?

9 A I recall there was some -- some lobbying
10 or some conversation, shall we say, about calls to
11 action. But I really -- I wasn't particularly
12 involved with it. These activities are handled by a
13 different department at PBS, and I -- and I really
14 have no special recollection or knowledge.

15 MR. SCHAEFFER: All right. I'm not going
16 to offer this in evidence. I think that it succeeded
17 in its purpose of refreshing the witness'
18 recollection, as far as I'm concerned.

19 I'm going to open a question which I think
20 may be the subject of some debate, so that may take a
21 little time.

22 BY MR. SCHAEFFER:

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1 Q You've testified you were the underwriting
2 -- you are the underwriting compliance officer at PBS?

3 A Yes.

4 Q And from time to time, when local stations
5 violate PBS guidelines or do -- or have inquiries
6 about PBS guidelines, does that fall within your
7 jurisdiction?

8 A Stations are not responsible to me.
9 Stations -- operations within, you know -- within
10 their stations are -- they are responsible only to
11 themselves, their boards, and the FCC.

12 Q Do you or anybody under your supervision
13 from time to time communicate with the local stations
14 about their underwriting announcements?

15 A We are -- for example, we are sometimes
16 asked by local stations our opinion as to whether a
17 particular announcement complies with PBS guidelines
18 or with the FCC's guidelines.

19 Q Now, I'll preface my next question -- my
20 next questions with this comment, which I think is
21 known to everybody else in the room.

22 White & Case has searched the Internet for

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1 web sites which purport to be or claim to be those of
2 local public broadcasting television stations which
3 are represented by PBS and that station -- that --
4 withdrawn. Let me start this off again.

5 White & Case has searched the Internet for
6 web sites which claim to be those of local PBS-
7 represented TV stations, and printed the results out
8 sometime in August and September 1997. Now, you would
9 have no reason to assume that if a station appears on
10 the web site -- the web page that anybody would be
11 counterfeiting that, I assume.

12 MR. RICH: I object to the form of the
13 question.

14 CHAIRPERSON GRIFFITH: The objection is
15 sustained.

16 MR. SCHAEFFER: All right.

17 BY MR. SCHAEFFER:

18 Q In any event, as I've said before, White &
19 Case has searched the Internet. I'm going to put
20 before you the results of that search with respect to
21 approximately 20 stations, and ask for your comments
22 as to whether or not you believe that the station's

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1 announcements violate the spirit or the letter of the
2 PBS guideline, and whether you think, given those
3 guidelines in the FCC regulations, the announcements
4 are appropriate.

5 MR. RICH: I will certainly object. This
6 is so far outside the scope of this witness' direct
7 testimony as to I would think not even be debatable as
8 to be outside of proper scope of cross examination.

9 CHAIRPERSON GRIFFITH: Okay.

10 Mr. Schaeffer?

11 MR. SCHAEFFER: We have here the chief
12 compliance officer of PBS with respect to
13 underwriting. It is impossible for you to understand
14 or know what is going out, in terms of solicitation by
15 the stations, without seeing what they are. So far,
16 you've heard generalizations and opinions from a
17 number of experts, and the like.

18 We have here a unique opportunity that we
19 have the man, the only person on the television side,
20 who is going to be able to discuss intelligently with
21 us whether or not the underwriting that we're
22 describing -- the underwriting messages -- are

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1 consistent with the guidelines, and to what extent
2 that they are commercial, which goes very much to the
3 heart of our case.

4 It seems to me this is in -- I had
5 previously offered this material, because I didn't
6 think it needed sponsorship, because I think they are
7 all admissions by the local stations who are
8 represented by PBS.

9 I know of no other way that we can
10 intelligently -- unless it is accepted on that basis,
11 which I gather has not yet been decided. I'm offering
12 to show it to this witness, so we can explore whether
13 or not it's appropriate under their own guidelines,
14 under the FCC guidelines, and discuss intelligently
15 what those messages are.

16 JUDGE GULIN: So at this point, you're
17 merely presenting them to the witness as hypothetical
18 messages, and you're wanting to know whether these
19 hypothetical messages would violate --

20 MR. SCHAEFFER: Well, they're not
21 hypothetical. We know, because we've had testimony --
22 I mean, I assume we can have different witnesses put

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1 their testimony -- Ms. Grajeda testified where she got
2 it from, and nobody -- nobody got --

3 JUDGE GULIN: But they're not in evidence
4 at this point, right?

5 MR. SCHAEFFER: They're not in evidence --

6 JUDGE GULIN: Well, they are in evidence,
7 but we have a pending motion.

8 MR. SCHAEFFER: That's right. And so I
9 would propose to show this to the witness and go over
10 it with him, so for heaven's sake you can see what it
11 is the stations are doing which we claim -- maybe
12 they're right, maybe we're wrong -- we claim this is
13 about as commercial as you can get and just like the
14 commercial broadcasters. Maybe we're wrong. That
15 will be for you to decide. But certainly, you should
16 have the opportunity of seeing what it is.

17 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

18 MR. KLEINBERG: I have nothing, Your
19 Honor.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. RICH: May I just --

22 CHAIRPERSON GRIFFITH: Yes.

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1 MR. RICH: -- clarify that my objection
2 transcends the issue of whether this is a proper
3 sponsoring witness.

4 CHAIRPERSON GRIFFITH: Yes.

5 MR. RICH: It's that the subject matter of
6 those documents about which he is being asked to
7 testify is light years beyond his direct testimony.

8 CHAIRPERSON GRIFFITH: All right.

9 JUDGE GULIN: And I guess Mr. Schaeffer's
10 point is it is within the scope of --

11 MR. SCHAEFFER: Yes. He --

12 JUDGE GULIN: -- his direct, because he
13 has indicated that sponsors are something different on
14 PBS as commercial.

15 MR. SCHAEFFER: There is commercial, but
16 there's something else. He has testified that there
17 have been -- there are restrictions on what they can
18 do in underwriting, that it's different from the
19 commercial stations.

20 CHAIRPERSON GRIFFITH: And your question
21 goes to whether -- the initial question goes to
22 whether or not this is a violation of their policy.

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1 MR. SCHAEFFER: Right. And then isn't --
2 and then I'm going to ask him, isn't this just like a
3 commercial?

4 Would you like to take a lunch break so
5 you can discuss it?

6 JUDGE GULIN: I don't know that that will
7 be necessary.

8 MR. SCHAEFFER: Okay.

9 CHAIRPERSON GRIFFITH: All right.

10 JUDGE DREYFUS: Counsel, have you seen
11 these documents yet?

12 MR. SCHAEFFER: Yes, you have. They are
13 the attachments to our direct case.

14 MR. RICH: There are 500 documents. I
15 don't know which one specifically Mr. Schaeffer has in
16 mind.

17 MR. SCHAEFFER: We'll be glad to show it
18 to him at the break.

19 May I suggest we show it to him at the
20 break, and then --

21 CHAIRPERSON GRIFFITH: That's -- okay.
22 That's what we were discussing.

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1 The objection, at this point, is
2 overruled, subject to our ruling on the pending
3 motion.

4 MR. SCHAEFFER: May I suggest -- and I
5 know we were going to do it at 1:15 -- why don't we
6 separate the documents, give them the set, and we can
7 return, whatever is convenient. Then they both can
8 look at them over lunch. It might save time.

9 JUDGE GULIN: What time do you want to
10 return?

11 CHAIRPERSON GRIFFITH: What time do you
12 want to return?

13 MR. SCHAEFFER: Whatever is good for the
14 Panel and for Mr. Rich and for -- the witness is the
15 one who's on the hot seat.

16 CHAIRPERSON GRIFFITH: Mr. Rich?

17 MR. RICH: An hour is fine.

18 CHAIRPERSON GRIFFITH: All right. I will
19 make it 2:15, to give you time to go over the
20 documents and have your lunch.

21 (Whereupon, at 1:03 p.m., the proceedings
22 went off the record for a lunch break.)*

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:21 p.m.)

CHAIRPERSON GRIFFITH: Mr. Schaeffer, are you ready, sir?

MR. SCHAEFFER: Yes, I am, Your Honor.

CROSS EXAMINATION (continued)

MR. SCHAEFFER:

Mr. Downey, you have before you as collectively Exhibit 6X some materials which we've described as excerpts from the Web pages of public television stations. I'd asked you to turn to the first one, WSKG.

JUDGE GULIN: Would it be helpful to mark these 6X A through --

MR. SCHAEFFER: Well, at the -- for our own facilitating, it might be easier. There are numbers on the bottom, right-hand corner of each, and I thought I would refer to those informally so that, even though it -- it would be easy to identify and actually would waste time marking it all over again.

That's my thought unless somebody has a different view. We'll mark the whole thing as 6X and

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1 then I'll refer to the pages from the Grajeda numbers
2 --

3 JUDGE DREYFUS: Okay.

4 MR. SCHAEFFER: -- because it will be
5 easier; they're already on there.

6 JUDGE DREYFUS: That's fine.

7 MR. SCHAEFFER: And if that gives somebody
8 any problems, we can always change it.

9 BY MR. SCHAEFFER:

10 Q Would you look at the collection that's
11 marked -- I think it's two through eight relating to
12 WSKG.

13 Incidentally, are you acquainted with
14 WSKG?

15 A Yes.

16 Q Where is that?

17 A Binghamton, New York.

18 Q Now would you look at three in which there
19 is -- and just read three -- 500.3, I'm sorry. And
20 just look at that for a moment and I'll ask you some
21 questions about that.

22 First of all, have you -- are you aware of

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1 whether, under the auspices of CPB or PBS or any of
2 the groups that advice the local television stations,
3 if they provide forms or suggestions on how to write
4 underwriting solicitations?

5 A Do we --

6 Q Well, do you know of anybody who does that
7 other than the stations themselves?

8 A Most stations have Washington counsel that
9 they rely on for guidance and interpretation of the
10 Commission's regulations.

11 Q Is there though an organization, maybe a
12 sister organization of PBS or some other organization,
13 interested in public television who provides materials
14 to the individual stations on which they can model
15 their solicitations of underwriting?

16 A Not to my knowledge.

17 Q Now would you look at that page which we
18 designated 500.3 which you just read, and do you
19 regard the message of WSKG here as consistent with the
20 PBS guidelines?

21 A Well, the only indication here would be
22 the second paragraph where evidently announcements can

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1 be longer than -- I take from this -- it's a little
2 ambiguous, but evidently an announcement can be longer
3 than 15 seconds.

4 So that wouldn't comply with the PBS
5 guidelines.

6 Q Indeed, it can be as long as 60 seconds if
7 this is accurate, is that correct?

8 A Uh-huh.

9 Q Would you agree with the first paragraph
10 that -- as it describes underwriting?

11 A Well, I agree that the term underwriting
12 isn't exactly a familiar term to most lay people
13 outside the business, so this is an attempt to try to
14 put it in some understandable context for a business.

15 Q Have you ever read a similar expression of
16 the meaning of underwriting before or heard it?

17 A Not these -- no.

18 Q No?

19 Do you think it's unique to WSKG as far as
20 you know?

21 A Well, let me say that there are lots of
22 differences between public television and commercial

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1 television.

2 Q Sure.

3 A And there are some similarities, the least
4 of which is that we both use television as a way to
5 communicate programs. Stations and PBS use or permit
6 underwriting announcements which bear some similarity
7 or resemblance to television commercials. And that is
8 a way to explain what it is. The mathematics, the
9 financial structure's entirely different; but when in
10 Rome, you have to use -- you know, often use that
11 language to convey a concept to a potential
12 underwriter that, by helping us support this program,
13 we can identify your company on the air.

14 Q And help your business?

15 A And that may help your business.

16 Q And help your business sell more
17 presumably, right?

18 A Well, if that's what your business is.

19 Q Well, doesn't it say generally, obviously
20 because it's not to a specific underwriter, "to make
21 smart, effective use of your marketing, promotion with
22 public relations dollars both for long term

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1 positioning and consumer awareness?"

2 That's commercial, isn't it? Wouldn't you
3 regard that as a commercial message?

4 A It's a commercial message. But, you know,
5 we don't want -- by the same token, neither would we
6 want to say to a corporation you'd be wasting your
7 money to make a contribution to us. I would agree
8 with that.

9 Q Sure. Let's move on because we've got a
10 few of these.

11 Again, would you turn to 500.17, Mountain
12 Lake Channel 57. And if you'd just read that first
13 page to yourself. I don't think you have to bother
14 with more unless somebody else wants you to.

15 You would agree, would you not, that
16 that's a commercial message; that what they're saying
17 is, the image and strength of the marketplace is a
18 lure to be an underwriter on Mountain Lake Channel 57?

19 MR. RICH: I'll object to the form of that
20 question.

21 CHAIRPERSON GRIFFITH: Do you want to
22 respond?

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1 MR. SCHAEFFER: Seems to me there's
2 nothing wrong with the question on cross.

3 CHAIRPERSON GRIFFITH: It's overruled.

4 THE WITNESS: I'm sorry, are you referring
5 to page one?

6 BY MR. SCHAEFFER:

7 Q Page 500.17.

8 A It says, "If you would like more
9 information about" --

10 Q That's right, yes.

11 And the question I said to you, isn't that
12 a solicitation based on commercial interest?

13 A Yes, it's the station inviting businesses
14 to make contact if they would like to be underwriters.

15 Q And saying that the reason for doing so is
16 it enhances your image and strength in the
17 marketplace, isn't that correct? So that's a business
18 solicitation like a commercial?

19 A I guess you could call it that.

20 Q Let's turn to 500.28, WCNY. Would you
21 read 500.28 to yourself up to the WCNY -- from WCNY
22 TV/WCNY II up to the -- that black line that stops

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1 there.

2 You would agree, would you not, that that
3 is, in essence, a suggestion that the underwriting
4 announcements are commercials?

5 MR. RICH: I object and ask the Panel for
6 an interpretation of this line of questioning, namely
7 is what's being elicited this witness' understanding
8 of what some third party wrote in these documents? He
9 has not written or sponsored any of these, and I --

10 MR. SCHAEFFER: No.

11 MR. RICH: -- have a problem with this
12 entire line of questioning. It's mostly his
13 interpretation of what somebody else's writing was.

14 MR. SCHAEFFER: The question is, this is
15 the man in charge of underwriting for PBS. And what
16 I'm trying to get -- and the suggestion has been made
17 on direct examination that underwriting by -- for
18 public television stations is essentially a
19 solicitation of charitable contributions and
20 essentially a solicitation of kind of payments made
21 for the common good.

22 And I'm suggesting and asking isn't this

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1 inconsistent with his own testimony by these two
2 stations that this is essentially a commercial -- a
3 suggestion that these will have commercial effect for
4 the stations, which I --

5 JUDGE GULIN: But of course, the premise
6 of your question is that this is accurate. You're
7 only asking for his interpretation of this, and I
8 think that's all that Mr. Rich is saying.

9 MR. SCHAEFFER: Well, what I'm suggesting
10 -- I think that may be, but I don't see that that's an
11 objection to my question.

12 JUDGE GULIN: He didn't object to it.

13 MR. RICH: I was asking for a
14 clarification of what Mr. Schaeffer was seeking to
15 elicit.

16 MR. SCHAEFFER: Okay, and I'll go one step
17 -- first of all, let me ask two questions.

18 BY MR. SCHAEFFER:

19 Q Do you regard this description of the
20 advantages of underwriting on page 500.28 as
21 consistent with the PBS guidelines of which you
22 supervise?

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1 A Well, the guidelines go to editorial
2 considerations and the content of messages. Now this
3 is talking about why one should underwrite. The
4 guidelines really have nothing to do with why one
5 should underwrite.

6 This suggests that, you know, by
7 associating with a quality program, it may be
8 beneficial for your business. We try to provide a
9 reason in addition to, for example, charitable
10 deduction for a contribution, the reason the company
11 should underwrite.

12 But, as it says right here, it's to
13 increase visibility while making a valuable and much
14 needed community contribution. And that's the point
15 of this.

16 Q You think the point of this is primarily
17 to make a contribution to the community as opposed to
18 enhancing any underwriter's position in the
19 marketplace?

20 A The point of this is to fund the programs;
21 to find dollars to make programs or to make them
22 available on one's local public television station.

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1 Q What is the point of advertising on a
2 commercial station? Isn't it in part to fund the
3 programs?

4 A Well, the -- no.

5 Q No?

6 A No, it isn't.

7 The point of the programs is to bring the
8 audience to whom to present the advertisement. And
9 the program is the bait in that case, not the benefit.

10 Q The program is the bait for the money from
11 the advertiser, --

12 A Right.

13 Q -- is that what you're saying?

14 And are you saying --

15 A No, no, no; I'm sorry.

16 It's the bait for the audience. It's to
17 get the audience to watch the program.

18 Q Mr. Downey, isn't it true that one -- when
19 one puts programs on the airways, one hopes to get
20 people's interest in the programs and then sells
21 advertisers on the fact that that audience will be
22 watching or hearing the program; isn't that correct?

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1 MR. RICH: Ask Mr. Schaeffer if he's
2 asking this in the context of public versus commercial
3 television.

4 MR. SCHAEFFER: I'm asking him --

5 JUDGE DREYFUS: He said commercial.

6 CHAIRMAN HALL: I thought I said
7 commercial, Mr. Rich.

8 MR. RICH: Sorry, I misheard.

9 MR. SCHAEFFER: Shall I repeat the
10 question?

11 MR. RICH: Please.

12 BY MR. SCHAEFFER:

13 Q In commercial broadcasting, isn't the
14 function of the program to get the audience to
15 encourage the advertiser to pay?

16 A No.

17 I'm sorry, the function of the program is
18 to deliver viewers to the set; to be exposed to the
19 advertiser's advertisements and presumably then go out
20 and buy the product.

21 Q Is it your testimony that the public
22 television stations of the United States do not tailor

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1 their programs to their audiences?

2 A They're tailored to the audience, yes.

3 Q And isn't it true that, on numerous
4 occasions, the tailoring of those programs to those
5 audiences are designed to get pledge money?

6 A Yes.

7 Q So how is that different than my
8 description of commercial broadcasting?

9 A Public television -- the purpose is --
10 lies in the program and the service it provides to the
11 community. As I said before, the objective isn't
12 necessarily to attract every viewer or, you know,
13 uniformly a large number of viewers; the focus is on
14 the content of the programs.

15 Q Doesn't that depend on the program? For
16 example, in the month of March, there are pledge weeks
17 throughout the United States, aren't there?

18 A There are.

19 Q Aren't those pledge weeks designed to get
20 money for the stations?

21 A They're designed to appeal to segments of
22 the population that aren't ordinarily members to bring

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1 --

2 Q And so by -- don't they do that -- don't
3 the stations do that by regulating the content?

4 A Yes, they regulate the content to
5 encourage people to become members of the station.

6 Q So in effect, they put on programs which
7 will get -- more likely to get people to pay money,
8 right?

9 A To make a voluntary contribution to the
10 station.

11 Q All right. Now let me ask you another
12 question.

13 Advertisers put on programs to get
14 audiences -- radio and television stations in the
15 commercial field, do they not, put on programs that
16 will attract audiences and therefore so that they can
17 sell that time to advertisers, isn't that correct?

18 A Agree with that.

19 Q There is no fundamental difference between
20 that and pledge week, is there, except that the payers
21 in the case of the public television is the audience?

22 A Well, I don't follow the last part, but --

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1 Q Well, you just told me that the purpose of
2 pledge week is to get in people who would not
3 ordinarily watch public television and ante up money
4 for the privilege of watching. Isn't that true?

5 A That's the purpose of some of the programs
6 in pledge week. We also run, you know, our regular
7 programming during pledge weeks.

8 Q Okay. That's essentially a commercial
9 enterprise, isn't it? You're trying to tailor your
10 programs to achieve a monetary return?

11 A I'm just -- I'm not comfortable with
12 tagging it as a commercial enterprise. You know --

13 Q So is whether or not --

14 A -- to do the best job you can either
15 making or acquiring a program to demonstrate the
16 nature of what public broadcasting is about in hopes
17 of gaining, you know, again, a voluntary contribution
18 from a member of the public because they believe in
19 what we're doing.

20 Now, if that's a commercial enterprise --
21 you know, I just can't -- I just don't agree with that
22 analysis.

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1 Q Don't you put certain entertainment on
2 such as Riverdance which will appeal to people and
3 encourage them to pay money?

4 A We put it on because we think it is a
5 quality program probably not available elsewhere
6 that's representative of the kind of programming that
7 PBS provides. We say in the pledge breaks around it
8 this is the kind of programming you can find here.

9 If you believe in -- you know, this is a
10 worthwhile program, then you'll contribute to help us
11 bring more worthwhile programs.

12 Q Would you dispute that there's a higher
13 concentration of music during pledge week than any
14 other time?

15 A I guess I would say there's more music
16 during pledge week than other times, yes.

17 Q And aren't you -- didn't you just tell us
18 that the purpose of pledge week is to promise the
19 viewers that they would see more programs such as they
20 are now seeing in order to encourage them to put in
21 their money?

22 A Well, we try to put on special -- you

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1 know, what I'll call special programs that attract a
2 high degree of attention that may involve, you know,
3 celebrities or, you know, well-known performers that,
4 you know, you might not see at some other time of the
5 year, and a good proportion of those turn out to be
6 music programs.

7 Q I thought you said that the motive for the
8 pledge payment was supposed to be that this is the
9 kind of program you would see on public television if
10 you will support public television?

11 A Well, by kind of programming, quality
12 programming.

13 Q Well, but if you put on more quality music
14 in order to obtain pledges, isn't that an implicit
15 promise that, in the future, there will be more music
16 on public television?

17 A Yeah, I think you have to be careful
18 painting, you know, this black and white. It's not to
19 suggest there is no music any other time of the year.
20 There may be a concentration of music performance
21 programs during pledge, but it's not to suggest they
22 aren't on at any other time of the year.

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1 Q Well, we'll get on to pledges in a minute.
2 Let me move on.

3 MR. SCHAEFFER: I have a proposal which I
4 think may be more practical in this. Rather than take
5 the witness through each one of these, and there are
6 20 of them -- I mean, I can ask the same questions,
7 whether or not they are consistent with PBS guidelines
8 and the like.

9 I would offer them in as evidence at this
10 time -- again, these particular ones -- and see if we
11 can avoid the cross examination. Mr. Rich has not
12 agreed -- this is one of the areas Mr. Rich has not
13 agreed should go in evidence, and I would just, to
14 save time, ask that we put it in for whatever it's
15 worth.

16 JUDGE GULIN: Okay, be precise. They're
17 already in evidence, but --

18 MR. SCHAEFFER: He's made a motion to
19 strike.

20 JUDGE GULIN: You want us to make a ruling
21 with respect to these documents?

22 MR. SCHAEFFER: Yes, and save some time.

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1 For whatever you think these documents are worth.
2 There are 20 of them -- 20 or so. Different stations.
3 Each one of them, you will see, has similar set ups.

4 And we submit that, on their face, they
5 really are in the nature of solicitations for
6 commercials.

7 MR. RICH: If I may, Your Honors, without
8 unduly repeating arguments that have been made, rule
9 251.43(e) provides that no evidence, including
10 exhibits, may be submitted in the written direct case
11 without a sponsoring witness.

12 The only purported sponsoring witness for
13 these documents is an employee of White & Case who
14 testified that her only knowledge concerning them was
15 that she found them on a Web site.

16 I don't believe that's adequate basis for
17 documents coming in for any probative value beyond,
18 again, whatever testimony Mr. Schaeffer wishes to
19 elicit concerning them of relevance to this case
20 through one or more witnesses on the stand.

21 Again, it seems to me we have a proceeding
22 where I can put a paralegal on the stand, push a few

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1 buttons on the Internet and throw in a whole bunch of
2 junk saying we have a sponsoring witness.

3 I'm inclined now to do that on our
4 rebuttal case.

5 MR. SCHAEFFER: The difference is, it
6 wouldn't be relevant.

7 This CARP, under 251.43(e), says that in
8 the case -- no evidence, including exhibits, may be
9 submitted in the written direct without a sponsoring
10 witness at all except where the CARP Panel has taken
11 notice, or in the case of incorporation by reference
12 or past records, or for good cause shown.

13 And it seems to me that what we have
14 established -- maybe this is unusual for a CARP. We
15 have taken what actually is very good evidence, the
16 local stations' own material, and tried to put it in
17 front of you.

18 And if -- I'm not quite clear what a
19 sponsoring witness is. I still don't exactly
20 understand it. But it seems to me, in the interest of
21 advancing this proceeding, that we should put this
22 material in evidence.

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1 If Mr. Rich has some objection that it's
2 phony or fraudulent, he -- I mean, I don't think he's
3 saying that. He can easily call any one of the
4 stations and have it. They're his clients ultimately.

5 But it seems to me that this is -- goes
6 right to the heart of the issue. These are the local
7 stations making solicitations of -- in effect, what it
8 amounts to is commercials.

9 JUDGE GULIN: Let me ask you something,
10 Mr. Schaeffer. Do you plan on putting on a rebuttal
11 case?

12 MR. SCHAEFFER: Yes, I do; but I don't
13 know that -- I would not ordinarily put on a rebuttal
14 case as the -- I don't think as to underwriting
15 because -- unless it's to some of the numbers that
16 went on this morning, which I think were incorrect.

17 But the question would be anybody I put on
18 who's an individual as a sponsoring witness is
19 feigning. Because the reality is, we got this
20 material from the stations themselves, and what's the
21 point of doing that?

22 I put somebody on who authenticated. I

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1 don't know what sponsoring witness is. When a party
2 makes an admission of this kind, what more can you do?

3 JUDGE DREYFUS: Well, Mr. Schaeffer, I
4 think not everything on the Internet is accurate.

5 MR. SCHAEFFER: Somebody just suggested to
6 me that --

7 JUDGE DREYFUS: Excuse me.

8 MR. SCHAEFFER: I'm sorry.

9 JUDGE DREYFUS: Not everything on the
10 Internet is accurate, number one. Number two, for
11 example, if it's talking about 60 second spots,
12 doesn't mean to me yet that if someone tried to place
13 an ad for a 60 second spot that that would be accepted
14 even though it's here on the Internet.

15 And the reason is, sometimes mistakes are
16 made.

17 MR. SCHAEFFER: Well --

18 JUDGE DREYFUS: And that this might be a
19 mistake. And unless you show us someone who did place
20 a 60 second spot that got on and was broadcast that
21 way, I don't accept this as absolute proof or
22 admission against interest with respect to the 60

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1 second spot -- this in and of itself.

2 MR. SCHAEFFER: I have to say, Judge
3 Dreyfus, I don't understand that. This is -- when
4 somebody says -- first of all, insofar as something
5 being -- you can get a lot of things off the Internet,
6 nobody has suggested realistically that somebody is
7 impersonating any of these stations.

8 So that I don't understand how it could be
9 false on the Internet.

10 With respect to the second issue, I don't
11 know if they got 60 second spots or not or 30 second
12 spots or 15 second spots. I only know they are
13 offering to the businessmen in their community on the
14 Web site the opportunity to make 60 second spots.

15 I think that's what goes to the issue.
16 What goes to the issue is they are soliciting. Maybe
17 they're successful in soliciting and maybe they're
18 not, but I don't understand that it's incumbent on me
19 to show that -- the fact that they're soliciting, to
20 show that the solicitation is accepted.

21 That would put a burden on me that's
22 impossible.

1 CHAIRPERSON GRIFFITH: What you're asking
2 us to do, Mr. Schaeffer, is to accept these documents,
3 to read them; and as you say, give them such weight.

4 MR. SCHAEFFER: That would be fine.

5 CHAIRPERSON GRIFFITH: However, you want
6 us to give them the weight to show that the
7 underwriting is indeed comparable to commercial
8 advertising.

9 MR. SCHAEFFER: Yes, and it speaks for --
10 the documents really speak for themselves.

11 CHAIRPERSON GRIFFITH: I understand.

12 JUDGE GULIN: If I may -- are you
13 finished? I'm sorry.

14 CHAIRPERSON GRIFFITH: Yes.

15 JUDGE GULIN: I agree with elements of
16 both arguments here. I think there is a problem that
17 there's no sponsoring witness for these documents. I
18 don't think this is the proper sponsoring witness.

19 It would have been very easy for you --
20 so, in some sense, we're talking about technicalities
21 here because these could have been put in your direct
22 case with a proper sponsoring witness.

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1 Which is why I was hoping that this would
2 be worked out between counsel because, to some extent,
3 it's a technical problem. The idea of sponsorship is
4 a somewhat nebulous concept, I agree. It's nowhere
5 defined in the rules.

6 But as I thought we indicated, it has
7 something to do with an appropriate witness connecting
8 the documents -- they've already been authenticated,
9 I think, adequately by Ms. Grajeda. She took them off
10 the Internet.

11 It's true they may not be -- we have no
12 guarantee that they're accurate, but we'll simply take
13 it as your evidence. We can always have rebuttal
14 evidence if they're not accurate.

15 But I guess what I'm saying is why
16 couldn't you do this on rebuttal? Have a proper
17 sponsoring witness to put this in on rebuttal and
18 they'll come in.

19 MR. SCHAEFFER: But what would he -- what
20 would the witness sponsor? All I can do is get
21 somebody like Mr. Ledbetter, for example, who will
22 come and say I've read all of these documents and then

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1 he would summarize them.

2 There's no sponsor -- usually when you
3 think -- I don't know what was meant by sponsoring
4 witness. I can understand what it means in the case
5 of third party admissions, an authenticating witness.

6 But I don't understand what it means to
7 sponsor -- and, as I say, I'm trying to deal with
8 substance and justice here. I welcome -- I have no
9 idea who could sponsor this.

10 CHAIRPERSON GRIFFITH: Well, it's someone
11 who actually produces the material, who has a
12 knowledge of the material and who can be cross
13 examined concerning the material.

14 MR. SCHAEFFER: But I can't do that
15 because I can't subpoena them and I can't speak
16 directly to them. Mr. Rich has made that eminently
17 clear. So that -- how can I do this?

18 JUDGE GULIN: Well, what about a witness
19 who opines that there is no difference essentially
20 between commercial advertising and public broadcasting
21 sponsorship? Now, it's -- I understand that to you
22 that seems like a very minor technicality to have

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1 someone come on the stand and say that, and that
2 person being a proper sponsor.

3 In my mind, that person will be a proper
4 sponsor because they've established the nexus between
5 these documents and his opinion. And I think that was
6 -- that's probably all that was envisioned by the rule
7 requiring sponsorship to avoid tons of documents being
8 dumped in a case without the Panel really
9 understanding why and having to wade through them all.

10 MR. SCHAEFFER: Well --

11 JUDGE GULIN: So what would prevent you
12 from doing that?

13 MR. SCHAEFFER: Nothing prevents me except
14 the very reason that you're giving me is it's a pure
15 technicality.

16 JUDGE GULIN: Yes, it's a pure
17 technicality.

18 MR. SCHAEFFER: You have the discretion.
19 I don't really understand -- it's not a common law
20 court even. And in the regular courts, when you have
21 a technicality of that kind, what's the point? If I
22 had discovery, I could simply serve notice to admit

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1 and I'd be finished with the darn thing.

2 But it seems to me to protract this
3 hearing while I get some paid expert, which is what it
4 will be, who will get on the stand and say gee, this
5 is a lot like what we do in radio -- I can do it.

6 Sure, I can do it. But it seems to me
7 senseless because, in the end, you don't care about
8 what that paid witness says; you're going to read
9 these. And that's why I say I appeal to the Panel
10 that this is kind of common law gobbledygook.

11 CHAIRPERSON GRIFFITH: Well, the
12 difficulty we have is Mr. Rich objects to your doing
13 it this way.

14 MR. SCHAEFFER: You have the ability, as
15 I understand it, under the rules, where there is good
16 cause, to waive the sponsoring witness requirement.
17 I respectfully submit that this is such a case.

18 Usually you do not get cases, I am
19 informed by people who are more experienced in this
20 area than I am, of third party admissions. Usually
21 you don't get this kind of issue where we're trying to
22 show that there has been a seed change or a different

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1 nated in an institution and where we are limited
2 because we don't have discovery ability and we don't
3 have the ability to subpoena.

4 And therefore, I would respectfully
5 request, rather than make me go through the really
6 folderol of getting in a paid expert who will say yes,
7 it looks a lot to me like paid commercials, which is
8 the same thing you're going to decide, and your
9 decision is far more important than the paid experts,
10 that we simply waive the -- say there's good cause
11 here to go ahead with this and leave Mr. Poor Downey
12 and me to go on to a more fruitful area.

13 CHAIRPERSON GRIFFITH: Do you have any
14 response, Mr. Rich?

15 MR. RICH: We all have frustrations about
16 these rules. I'm not going to rehearse my
17 frustrations, including getting some simple data out
18 of ASCAP and BMI to which I gather that at least one
19 of the parties will be objecting, and conceivably
20 tomorrow in their papers.

21 So I don't think the issue is what's fair
22 or not fair. We live with the rules as they exist

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1 here. I think it's terribly unfair to, in essence,
2 shift the burden to PBS, put into evidence and proffer
3 hundreds of documents, and then Mr. Schaeffer to say
4 well, Mr. Rich can call witnesses to rebut all this.

5 That's not the presumption of the rules as
6 I understand them. The presumption is the sponsoring
7 party has to proffer a witness that makes the kind of
8 connection to which you refer that allows cross
9 examination of questions such as Judge Dreyfus has
10 about the reliability of the documents and what
11 they're worth as opposed to shifting the burden onto
12 me by dumping a truckload of documents onto our client
13 and then say you can put on people on the rebuttal
14 case from all over the country if you want to.

15 I don't think that's the spirit of the
16 rules.

17 JUDGE GULIN: Well, then in your view of
18 sponsorship, it would actually require an official
19 from the stations to sponsor the documents. Do you
20 think that's what was envisioned?

21 MR. RICH: I think --

22 JUDGE GULIN: Who else could authenticate

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1 a document in that manner?

2 MR. RICH: Well, I think that there's no
3 guarantee that any piece of evidence that somebody
4 wants to put in in a proceeding comes in other than
5 through the normal techniques of somebody who has some
6 information on which the Panel can rely.

7 Yes, I would say that the most
8 knowledgeable people about this are representatives of
9 the authors, the stations themselves. That, to me, is
10 self-evident.

11 The fact that it may be frustrating to a
12 party not to have available to them because of the
13 limited compulsory process provisions for witnesses is
14 a frustration which I share in similar fashion.

15 I've been foreclosed from discovery in
16 this case that I very much wanted to have in.

17 JUDGE GULIN: And in this type of an
18 administrative proceeding, under your view, this type
19 of evidence can never come in unless they're somehow
20 able to convince a station official to testify?

21 MR. RICH: Well, they've been quite
22 successful in getting people they claim to be experts

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1 to testify to the very sorts of propositions, Judge
2 Gulin, you suggested might have satisfied your
3 concern.

4 That was the essence of the Day and
5 Ledbetter testimony as I heard it saying that it's
6 very similar. At a level of generality, fine; but I
7 would submit that's very different than taking in as
8 punitive admissions, you know, offers on a Web site
9 done by who knows what level of station management or
10 sales force; you know, reaching out there -- subject
11 to when these messages come in, what really happened
12 when they get ground up against the FCC rules, against
13 the internal station guidelines, against the kind of
14 internal checks and balances.

15 We have no idea. It's just an advertising
16 -- set of advertising solicitations over a Web site
17 and of terribly little probative value. And I think
18 the prejudice to us of putting them in without some
19 better sense of their reliability or what they really
20 reflect in real practice outweighs the probative value
21 of this material.

22 I mean, we're all frustrated by the

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1 process here. There's no doubt about it.

2 MR. SCHAEFFER: It's a catch-22. And one
3 particularly inappropriate, as I see it, and something
4 that's denominated in arbitration. Because the
5 purpose of arbitration is to get to the heart of the
6 matter as inexpensively and reasonably as possible.

7 Here what we're getting as suggestion is
8 that we have this complicated system which should --
9 you know, it frustrates the workings of the
10 Arbitration Panel in considering things. Tough. The
11 practice overcomes the substance.

12 What you have here is you can read the
13 uniformity of these solicitations, what it is overall.
14 But nobody is better than you to read that, to
15 understand it. And I just don't understand why, other
16 than -- it seems to me a sponsoring witness must be
17 different in different contexts.

18 Where you're dealing with third party
19 witnesses, I don't see why, since the rules don't say
20 that, a sponsoring witness is any more than
21 authentication of what a third party said. It is for
22 you to determine whether this is relevant.

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1 When Mr. Rich says we're dumping lots of
2 stuff on you, what I'm now doing is giving you
3 material which I think is highly relevant to what the
4 local stations are doing in soliciting underwriting.
5 I've authenticated it through Ms. Grajeda.

6 Why that is more of a sponsorship, I don't
7 know. I could understand if I had a statistical study
8 and I just dumped that on you and I didn't have a
9 sponsoring witness. But when you had admissions and
10 facts of this kind, which are obviously relevant, it
11 seems to me sponsorship -- and I would ask you to
12 reconsider that.

13 Sponsorship can mean no more than --
14 that's what the third party said. Are all witnesses
15 here to be non-fact witnesses?

16 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
17 you have any comment, sir?

18 MR. KLEINBERG: Yeah, I do, Judge.

19 We cannot lose sight of the fact that the
20 punitive authors of these documents are the parties.
21 Mr. Schaeffer calls them third parties. They aren't
22 third parties. They are the parties to this

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1 proceeding.

2 They aren't calling them. We can't call
3 them. Literally we can't call them up. Ethically we
4 can't call them up. We can't subpoena them. The
5 records are sitting there, and now we're told they may
6 not be accurate.

7 Well, I mean, there has to be some good
8 faith basis to suggest that these things aren't what
9 they appear on their face to be. And they appear on
10 their face to be -- and the fact that there are
11 hundreds of them I think gives credibility to the
12 notion that they appear to be what they are, which is
13 efforts on the part of all of the applicant stations
14 to obtain advertising, underwriting.

15 Call it whatever you like. We know what
16 the issue here is and we're all talking about it. And
17 we know clearly what the issue is.

18 CHAIRPERSON GRIFFITH: All right, give us
19 just a minute.

20 MR. RICH: If I may just make a final
21 comment responsive to Mr. Kleinberg.

22 The stations are not parties to this

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1 proceeding. We are not counsel to 350 public
2 television stations. We are counsel for the Public
3 Broadcasting Service. We are counsel for National
4 Public Radio. We are counsel for the Corporation for
5 Public Broadcasting.

6 They have been the signatories to the
7 agreements. They have tendered the payments for the
8 societies on behalf of and in lieu of individual
9 payment from the individual stations.

10 We are not counsel to the individual
11 stations.

12 CHAIRPERSON GRIFFITH: All right.

13 MR. SCHAEFFER: I have just two -- and I'm
14 sorry for belaboring it.

15 CHAIRPERSON GRIFFITH: All right.

16 MR. SCHAEFFER: One, it's pointed out to
17 me that in subdivision (k) of 251.4.47 it says,
18 "However, upon leave from the Panel, the document may
19 be admitted as evidence without a sponsoring witness
20 if official notice is proper or, if in the Panel's
21 view, the cross examined witness is the proper
22 sponsoring witness."

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1 Now in addition to that, I'm looking at
2 Ms. Jameson's testimony which is in front of us, and
3 it says "PBS and NPR are proposing a rate adjustment
4 in the total amount of compulsory license fees, etc."

5 PBS and NPR are thus acting in this
6 proceeding on behalf of all such noncommercial
7 broadcasters, and we have structured our presentations
8 accordingly. So we -- they are parties. They are
9 acting in a representative capacity.

10 Ms. Jameson herself, in testimony that
11 undoubtedly was approved by Mr. Rich's firm, has said
12 so. And there's no dispute about it.

13 CHAIRPERSON GRIFFITH: Okay, thank you.

14 All right, just a moment. Judge Gulin is
15 going to make our ruling.

16 JUDGE GULIN: All right, obviously, as
17 we've been saying, there has to be a sponsoring
18 witness for these documents. There has not been a
19 proper sponsoring witness up until now, so our
20 choices, as I see it, are grant the motion to strike
21 the documents, or allow it to come in under official
22 notice, or find that the present witness is the proper

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1 sponsoring witness.

2 Those are our three choices. And
3 obviously -- we obviously can't take official notice
4 of these documents. So either we're going to strike
5 the documents from the record or find that Mr. Downey
6 is an appropriate sponsoring witness.

7 It's a very close question to us as to
8 whether Mr. Downey is a sponsoring witness within the
9 meaning of the rule. But we're also mindful that this
10 is a technical matter to a great degree. These
11 documents can easily be put into evidence with another
12 witness on rebuttal.

13 And we're mindful of Mr. Schaeffer's point
14 that it would almost be an exercise of -- that's just
15 not necessary. So we're inclined to rule that these
16 documents will come into evidence and Mr. Downey will
17 be a sponsoring witness for these documents.

18 So as to the documents before us, 6X, the
19 motion to strike is denied.

20 MR. SCHAEFFER: Your Honors, I will now --
21 I'm not going to pursue this any further with Mr.
22 Downey because I think I'm just wasting our time. And

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1 maybe Mr. Kleinberg has a different view and maybe Mr.
2 Rich does.

3 But let me move on because the hour is
4 growing older. I'm going to skip some of the material
5 that I had and go to another --

6 BY MR. SCHAEFFER:

7 Q You mentioned a show called Wishbone. Now
8 you've -- in your direct testimony you wrote, Mr.
9 Downey, "If a public television -- if public
10 television operated like a commercial broadcaster,
11 many of these programs simply would not see the light
12 of day."

13 Do you recall doing that?

14 A Yes.

15 Q Okay. And that's at page eight.

16 Now I'm going to address your attention to
17 Wishbone. Wishbone is an award winning children's
18 literary series, is it not?

19 A Yes.

20 Q It's won an Emmy?

21 A I'm not confident of that.

22 Q Well --

1 A Certainly it's a children's programming --

2 Q You would agree, would you not -- how many
3 years has it been running on PBS?

4 A I believe it's been running about two
5 years.

6 Q And it has --

7 A Three.

8 Q -- been highly acclaimed?

9 A Yes.

10 Q In essence, I believe it's a story about
11 a terrier who dresses up as literary figures, --

12 A Yes.

13 Q -- or something along those lines?

14 It is a fact, is it not, that it was
15 scheduled to be canceled in 1996?

16 A Not to my knowledge.

17 Q Well, I'm going to show you a newspaper
18 article. Maybe that will -- I believe that will
19 refresh your recollection for that.

20 MR. SCHAEFFER: Would you show 713.55 to
21 Mr. Downey and to Mr. Rich and the Panel?

22 CHAIRPERSON GRIFFITH: The ASCAP Exhibit

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1 7X?

2 MR. SCHAEFFER: 7X; yes, Your Honor.

3 (Whereupon, the above-mentioned
4 document was marked as ASCAP
5 Exhibit 7X for identification.)

6 BY MR. SCHAEFFER:

7 Q Would you just read that to yourself?

8 I see you've finished reading it. Does
9 that refresh your recollection that Wishbone was
10 sentenced to death, so to speak?

11 A That's an incorrect characterization.

12 Q Okay, well tell me what you do recall.

13 A Like any program, it takes money to
14 produce it. The money has to be found. An initial
15 batch of 40 episodes was produced. The producers have
16 come to PBS seeking funding to produce additional
17 episodes.

18 And to date, we have not agreed to provide
19 that funding. Now that is not to say, however, that
20 the series has been canceled. We have just not, so
21 far, elected to invest PBS funds in its continuation.

22 Moreover, were the producers to find

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1 funding from the third party sources, thus not -- you
2 know, eliminating the need for PBS funding, then it
3 would definitely continue on PBS.

4 Q Are you acquainted with a Kathy Quattrone,
5 Q-u-a-t-t-r-o-n-e?

6 A Yes.

7 Q Who is she?

8 A She's the senior programming official at
9 PBS.

10 Q All right.

11 MR. SCHAEFFER: And would you produce to
12 -- we're not putting that in evidence yet. I'm not
13 offering it. I don't know that it's necessary.

14 Would you give the Panel our next exhibit
15 for identification which is 7 --

16 CHAIRPERSON GRIFFITH: 8X.

17 MR. SCHAEFFER: Which is a copy of page
18 seven of Current for January 19, 1998.

19 (Whereupon, the above-mentioned
20 document was marked as ASCAP
21 Exhibit 8X for identification.)

22 BY MR. SCHAEFFER:

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1 Q And would you look particularly -- you can
2 read the whole thing if you want to, Mr. Downey, but
3 if you'd look in the first column, the third
4 paragraph, I think it is, where it starts with the
5 word "topping the good news."

6 And let me know when you're finished
7 reading it.

8 A Yes.

9 Q Do you know now or did you ever know that,
10 in fact, Wishbone had been, in effect, saved by Chuck
11 E Cheese and 7-11, or is that not known to you before?

12 MR. RICH: Object to the form.

13 THE WITNESS: The producers of Wishbone --

14 CHAIRPERSON GRIFFITH: Wait just a minute,
15 please.

16 Do you want to respond?

17 MR. SCHAEFFER: No, I --

18 CHAIRPERSON GRIFFITH: Okay.

19 The objection's sustained.

20 BY MR. SCHAEFFER:

21 Q Are you aware of the fact that Wishbone
22 has been -- is now being the subject of underwritings

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1 by Chuck E Cheese and 7-11?

2 A I'm aware that they're underwriters, yes.

3 Q Is that from the article or does this just
4 remind you of it?

5 A I was aware of that.

6 Q Okay. Is it fair to say that, but for the
7 underwriters, that if no other underwriters had come
8 forward, Wishbone would not have been continued on
9 PBS?

10 A As I said before, the producers -- Big
11 Feets Productions provided 40 episodes of Wishbone to
12 PBS. We contributed to that production cost. It was
13 in large measure deficit financed by the producers.

14 What we acquired from the producers is the
15 right to show the program for some number of years.
16 Heretofore, until the time of this announcement, there
17 had been no underwriting secured for that program. At
18 this point, underwriting was secured.

19 But the underwriting goes to that first 40
20 episodes, not any subsequent set of episodes. So when
21 you talk about canceling Wishbone, Wishbone will end
22 when its rights end unless there are more episodes

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1 produced.

2 In order to produce more episodes, either
3 PBS has to come up with the money or some additional
4 or other set of underwriters has to come up with the
5 money. That hasn't happened yet.

6 What this article again refers to was
7 underwriters found who were added -- whose names were
8 put onto the first 40 episodes which are presently in
9 distribution on PBS. And those funds flowed to the
10 producer to help mitigate their multi-million dollar
11 deficit.

12 But again, that's recovering, you know,
13 production deficit for the first series. It's not --
14 hasn't to do with a second series.

15 Q Is it your testimony that not -- that if
16 you had not achieved these underwriters, that Wishbone
17 would have continued?

18 A The first block of the -- the block of 40
19 episodes will continue on PBS until the rights expire,
20 notwithstanding the outcome of any underwriting
21 efforts.

22 Q The other day, some -- now is it -- I

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1 believe it was your direct testimony also that, but
2 for public television, viewers of certain types of
3 program and particularly children's program would not
4 -- withdrawn; that's not right.

5 You testified, I believe, that, at a time
6 of great debate over some of the programming found on
7 commercial television including cable, public
8 television is striving. Viewers depend on public
9 television for certain types of programming they
10 cannot attain anywhere else whether their particular
11 interest is public television's children line up or
12 other things.

13 Now, in fact, isn't it true that cable and
14 commercial television are now providing similar fare
15 in many respects which is precisely the reason that so
16 many stations seek to convert underwritings to
17 commercials, and this is particularly true as to
18 children's television?

19 MR. RICH: I would object.

20 JUDGE GULIN: I lost sight of the
21 question.

22 CHAIRPERSON GRIFFITH: Rephrase the

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1 question.

2 BY MR. SCHAEFFER:

3 Q Isn't it -- let's put it another way.

4 Isn't it true that, at the present time,
5 cable television and also network television is
6 providing children's fare equal in quality to the
7 children's fare that is on public television?

8 A I don't accept that, no.

9 Q Are you acquainted with Ms. Alice Cahn,
10 C-a-h-n?

11 A Yes.

12 Q Who is she?

13 A Alice is in charge of children's
14 programming for PBS.

15 Q Now I'm going to show you a copy of an
16 article which appeared in *The New York Times* on March
17 25, 1998.

18 MR. SCHAEFFER: Would you show that to the
19 Panel? And we'll offer that as -- we'll just identify
20 that as 9X.

21 CHAIRPERSON GRIFFITH: 9X, ASCAP 9X.

22 (Whereupon, the above-mentioned

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1 document was marked as ASCAP
2 Exhibit 9X for identification.)

3 BY MR. SCHAEFFER:

4 Q Have you seen this article before?

5 A No, I haven't.

6 Q Are you aware that apparently an
7 educational show for preschoolers on Nickelodeon
8 called Blue's Clues is now drawing more viewers each
9 week than Sesame Street?

10 A I'm aware of Blue's Clues, yes.

11 Q Now Ms. Cahn is quoted as saying the
12 following: "We're seeing a paradigm shift" -- this is
13 in the second column of the first page.

14 "'We're seeing a paradigm shift where
15 people realize that it's not only on public television
16 that you can find quality children's programming,'
17 said Alice Cahn, director for children's programming
18 at PBS. She just signed another four year contract
19 with Children's Workshop -- Children's Television
20 Workshop, producers of Sesame Street, which is now in
21 its 29th season.

22 "'I also think we have a generation of

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1 parents who grew up with a comfortable feeling about
2 television that our parents didn't have and, frankly,
3 that I didn't have raising mine,' said Ms. Cahn, whose
4 child is now 18.

5 " 'They have a willingness to shop around
6 on television and see what's there.' She also admires
7 Blue's Clues, as does Peggy Charren, children's
8 programming activist."

9 Now, do you have any reason to believe
10 that Alice Cahn did not say what is described in this
11 article?

12 A I'd like to point out you asked me whether
13 I thought there were channels that -- children's
14 channels on cable that provided programming that is
15 equal or greater quality to PBS. I think Blue's Clues
16 is a terrific program, but it's only one program.

17 That doesn't make a channel.

18 Q Would you agree with Ms. Cahn that we're
19 seeing a paradigm shift where people realize that it's
20 not only on public television that you can find
21 quality children's programming?

22 A We are seeing -- well, Nickelodeon has

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1 been on, you know, for ten years or more. And some of
2 its programs are quite good. Does that make a
3 paradigm shift? I'm not sure I agree with Alice on
4 that.

5 Q But you do agree, do you not, that
6 Nickelodeon is now showing, among others, first
7 quality children's television?

8 A I do agree that Blue's Clues is a superb
9 program and it's on Nickelodeon. Nickelodeon has some
10 other programs that I think are not very good.

11 Q And do they have some others that you
12 think are good?

13 A I think I just said that.

14 Q No, besides Blue's --

15 A That's the only program that comes to mind
16 on Nickelodeon that I would think is of a par or of a
17 quality comparable to what's found on public
18 television.

19 Q Are there other shows such as Bill Nye
20 which are on other children's channels or other
21 children's television?

22 A Bill Nye appears on commercial television

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1 broadcast, but it doesn't appear on cable.

2 Q All right. And is that a good children's
3 show?

4 A Yes, I think so.

5 Q And what about The Magic Schoolbus; where
6 is that carried?

7 A Magic Schoolbus was formerly -- I guess it
8 actually still is on PBS, but either just has or soon
9 will migrate -- I'm not sure.

10 Q To Fox?

11 A Yes, you're right; thank you, Fox.

12 Q So isn't it a fact that, in recent years,
13 there have been an increase in high quality children's
14 educational programs -- children's television programs
15 in part perhaps by the stimulation of public
16 television?

17 A Well, there's a lot of things going on.
18 You know, the Commission has imposed the three hour
19 rule which means commercial networks have to run three
20 hours of children's programming a week which accounts
21 for the migration of Scholastic.

22 That was a public television program that

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1 migrated to commercial television.

2 Q So that would it be fair to say that there
3 is a trend in the commercial side, both cable, network
4 and perhaps even local television, to start putting on
5 children's programming perhaps stimulated by the FCC
6 and certainly stimulated by public television's good
7 example?

8 A There has been a trend of some programs
9 migrating from public television and some programs
10 being created by commercial television in response to
11 a regulatory requirement.

12 There's been -- you know, I mean, the
13 basic cable is made up of program services, many of
14 which emulate aspects of public television.

15 Q You understand, do you not, that the fees
16 being set by this CARP are based on what is going to
17 happen in the next five years -- they're anticipatory,
18 not perspective -- do you not?

19 A I understand that.

20 Q So it's your testimony, is it not, that
21 there are trends in the television marketplace which
22 provide alternative children's educational

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1 programming? You just said I think that cable is
2 becoming increasingly as encroaching on public
3 television's fare, is that correct?

4 A No, I said there are -- among basic cable,
5 there are channels that -- many channels that emulate
6 certain aspects of public television.

7 Q So there is, for the viewer, an increasing
8 menu by virtue of cable, the FCC and economic
9 circumstances to -- and by virtue of that increased
10 menu, many of the things that were formerly only seen
11 on public television are now seen outside of public
12 television, isn't that true?

13 A Because of basic cable, there are many
14 things that were formerly available only on public
15 television that are now available in other venues.
16 But I'm speaking again on genres of programming, not
17 necessarily rising to the quality level of PBS
18 programming.

19 Q And in fact, as a consequence of that,
20 doesn't it make it somewhat more important for public
21 television to satisfy potential underwriters to pick
22 up the tab for its existing and future programming?

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1 A Well, in the first place, the amount of
2 underwriting in children's programming is very little.
3 It's, I think, around three million out of 70 million.

4 Q I'm talking about, generally speaking, the
5 fare that's on public -- withdrawn. Let me ask the
6 question in a different way.

7 Isn't it a fact that underwriting dollars
8 are now -- I'll come back to this. I'll come back to
9 this. Let's move on to -- we'll get that at the
10 station equity level.

11 Would you dispute that public television
12 sources of revenue increasingly depend on member
13 subscriptions and underwriters' payments?

14 A Well, I guess I would have to dispute
15 that, yes.

16 For example, the Federal appropriation is
17 rising. It's risen from \$250 to \$300 million. So
18 there's an example of -- I mean, the implication of
19 your question is, is that the only source of income
20 that's rising, and the answer is no.

21 Q Would -- is it your -- tell us about the
22 increase in Federal funding.

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1 A Well, funds are appropriated annually
2 which flow to the Corporation for Public Broadcasting.
3 And I believe -- this is not my area of expertise, but
4 the appropriation has risen, as I said, from I think
5 \$250 to \$300 million between fiscal 1999 and fiscal
6 2000.

7 Q So that Congress is not cutting the
8 appropriations in the future for public television or
9 public broadcasting, is that correct?

10 A I can only -- Congress deals with this one
11 year at a time.

12 Q Yes, I understand.

13 A If I could predict the future of what
14 Congress is going to do, I'd be in another business.

15 So, for the coming year, it is projected
16 to rise, but there's been no appropriation beyond
17 that.

18 Q Well, it's more likely that if you have
19 the -- what's happened is an authorization as opposed
20 to an appropriation?

21 A Now I'm in trouble.

22 Q Yeah.

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1 A I'm not sure of where we are in the --

2 Q Well, what's your basis for saying that
3 the Congress is increasing its likely expenditures for
4 public broadcasting?

5 A Well, I'm sorry; it is -- the \$300
6 million, to the best of my knowledge, is an
7 appropriation. I mean, that has been voted on by the
8 Congress. It is now in the law.

9 Q So that --

10 A So that is an increase from the present
11 year.

12 Q And so given that, we anticipate that over
13 the next five years, there's no reason to believe
14 there will be a diminution in Federal support for
15 public broadcasting, is that correct?

16 A I can't agree to that. You know, two
17 years ago, the Speaker of the House was talking -- or
18 three years ago -- zeroing out public broadcasting.
19 We live in a fast changing environment.

20 Now in the short term, that is for the
21 next year, there's a rise -- an increase in Federal
22 funding, but I can't speak to what happens beyond

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1 that.

2 Q Now if, on the other hand, there had been
3 a decrease in funding, wouldn't you be telling this
4 Panel at the present time that the trend in the future
5 is less Federal funds?

6 A Well, --

7 MR. RICH: Objection.

8 CHAIRPERSON GRIFFITH: The objection is
9 sustained.

10 BY MR. SCHAEFFER:

11 Q In making -- in taking the positions that
12 public television does in this proceeding, don't you
13 base your analysis on what you know is going to happen
14 in the next five years or think is going to happen in
15 the next five years?

16 A The best I can respond is to say, you
17 know, looking at what's happened over the past five
18 years, knowing what I know about the environment, I'm
19 not expecting dramatic changes in the coming five
20 years.

21 There is an increase in the Federal
22 appropriation, but some of these, you know, sources

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1 have been decreasing, in particular support from
2 corporations.

3 Q There is already, I believe, in evidence
4 Exhibit 301 which is the 1996 annual report of the
5 Corporation for Public Broadcasting. And I've asked
6 that it be distributed. We also have some colored --
7 we have colored -- we have taken the actual colors and
8 we should give that because it's easier to see.

9 JUDGE GULIN: That's the what, the 19 --

10 MR. SCHAEFFER: The 1996 Corporation for
11 Public Broadcasting report. I don't think you have it
12 in that batch. It's entitled Comes Down to the Future
13 and How We're To Pay For It. They are ASCAP Exhibit
14 301.

15 CHAIRPERSON GRIFFITH: Filed with your
16 direct case?

17 MR. SCHAEFFER: This is page 17 of the
18 report.

19 JUDGE GULIN: And this is not a document
20 in dispute, correct?

21 MR. SCHAEFFER: I don't believe.

22 Ms. McGivern corrects me. It's 300.

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1 CHAIRPERSON GRIFFITH: It's 300?

2 MR. SCHAEFFER: ASCAP 300. It's page 17
3 from ASCAP 300.

4 MR. RICH: Give us a moment.

5 MR. SCHAEFFER: Sure.

6 MS. MCGIVERN: It's the Corporation for
7 Public Broadcasting's annual report for 1996. Oh, I'm
8 sorry, it's 302.

9 CHAIRPERSON GRIFFITH: Is that the whole
10 thing?

11 We don't need this then?

12 MR. SCHAEFFER: Well, it just makes it
13 easier to read.

14 CHAIRPERSON GRIFFITH: Oh, okay.

15 MR. SCHAEFFER: That's the reason we did
16 it. It's hard to read the other one.

17 BY MR. SCHAEFFER:

18 Q Mr. Downey, would you agree from that
19 chart that the trend since 1975 overwhelmingly is that
20 private funding is becoming increasingly important in
21 relative terms to the funding of public broadcasting?

22 A Increasingly in contrast to Federal, or

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1 are you just saying --

2 Q In contrast to all governmental, including
3 Federal.

4 Isn't that pretty clear?

5 A Well, the proportion -- the mix has
6 changed. Obviously the number has increased over
7 those what, 20 some odd -- 20 years.

8 Q Yeah.

9 A And the proportion appears by this graph
10 to have become more -- you know, more weighted towards
11 private than tax-based or Federal, whatever the
12 contrast is.

13 Q Now there are two ways, are there not,
14 over the next five years, that public television and
15 public broadcasting generally will achieve much of, if
16 not all, of their private funding. One is pledge
17 drives, and secondly is from underwriters, correct?

18 That would be the overwhelming way of
19 collecting private funds?

20 A Private funds?

21 Q Yes.

22 A Yes, over -- yes, the corporate and

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1 membership.

2 Q All right. I'm going to ask you to take
3 a look at an article which appeared in *The Boston*
4 *Herald* on December 1, 1997 and to distribute that
5 among the counsel and the Panel.

6 (Whereupon, the above-mentioned
7 document was marked as ASCAP
8 E x h i b i t 1 0 X f o r
9 identification.)

10 MR. RICH: I'm sorry, was this marked?

11 JUDGE GULIN: It's already in evidence.

12 MR. SCHAEFFER: It's already in. I just
13 made a photo -- we just made a color copy so you could
14 see it.

15 CHAIRPERSON GRIFFITH: This is --

16 MR. SCHAEFFER: 10X.

17 CHAIRPERSON GRIFFITH: -- 10X?

18 BY MR. SCHAEFFER:

19 Q Now if you'd just take a look at those two
20 pages, I have some questions to ask you about them.

21 Would you agree with Ms. McCarthy, as she
22 states in the second paragraph, that the purpose of

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1 the pledge program is to create an atmosphere for
2 people to support the station or be happy they're
3 already supporting the station?

4 A Yes.

5 Q You used to work with WGBH many years ago,
6 I take it?

7 A I did.

8 Q And WGBH is one of the big four, so to
9 speak, of producing stations?

10 A Yes.

11 Q Would you also agree that "many of the
12 specials aired during these times are intended to
13 connect with people on an emotional level," --
14 according to Mr. Bachman that was. Would you agree
15 with his statement?

16 A Yes, but it's not to suggest that programs
17 at other times of year aren't intended to.

18 Q Okay, that's a fair comment.

19 Then he goes on to say, "Other programs
20 are special events meant to make the viewer feel
21 connected to the station," and I assume you would
22 agree with that as well?

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1 A Yes.

2 Q The article goes on to say that "pledge
3 specials come from several sources," which I take it
4 is true?

5 A Yes.

6 Q And according to Mr. Bachman, "PBS has a
7 department geared toward commissioning and acquiring
8 such shows for fund raising." Is that true?

9 A That is true.

10 Q What is the name of that department?

11 A The name of the undertaking is the Station
12 Independence Program, the objective being to allow
13 stations to find sources of private money which will
14 make them independent, and we most commonly use the
15 acronym SIP, S-I-P.

16 Q Now Mr. Bachman says that that department
17 is geared toward commissioning and acquiring such
18 funds -- such shows for fund raising. I'm not clear
19 what he means, but is there some effort by the SIP
20 program, if that's what it is, toward getting shows
21 that will be particularly appropriate for fund
22 raising?

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1 A That's what it does is find --

2 Q And how does it do that?

3 A It has a small staff that either
4 commissions or acquires programs which it feels will
5 be, you know, regarded as successful.

6 Q So it actually, in effect, buys the rights
7 to individual programs which it thinks are
8 particularly appropriate for pledge week or whatever,
9 is that --

10 A Yes.

11 Q That's my understanding.

12 Are SIP programs on the PBS feed?

13 A Yes, they're fed by PBS.

14 Q Okay. Now he also mentions here the
15 American Program Service also provides such shows.

16 What is the American Program Service?

17 A It is a separate -- it is a program
18 distributor based on Boston that is independent of PBS
19 but is -- whose client base is all public television
20 stations.

21 Q And to your knowledge, do they also
22 provide certain kinds of program especially for fund

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1 raising or pledging or that kind of thing?

2 A Yes.

3 Q Then the article goes on to say, "The mix
4 of regular series, concerts, nostalgic specials and in
5 studio events are geared" again "to entertain and
6 inform viewers. But the bottom line really is public
7 television's bottom line."

8 "All money collected in December" -- this
9 is the WGBH -- "will go to the station's new program
10 fund."

11 Is that a fair characterization of the
12 programs that are acquired by SIP and sort of destined
13 to be pledge week drives?

14 MR. RICH: We're focusing on the first of
15 the two sentences you read?

16 MR. SCHAEFFER: Yes, I am.

17 MR. RICH: Thank you.

18 THE WITNESS: I'm sorry, which is the --

19 BY MR. SCHAEFFER:

20 Q "Mix of regular series, concerts,
21 nostalgic specials and in studio events are geared to
22 entertain and inform viewers."

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1 I'm asking if those kinds of shows are
2 particularly appropriate for pledge week or that sort
3 of fund raising?

4 A Well, I agree with that first sentence, if
5 that's the question.

6 Q Okay, that's satisfactory to me.

7 Now isn't it a fact that certain specials
8 have been unusually successful for public television
9 stations in the last few years?

10 A As with anything in life, some endeavors
11 are more successful than others and -- yes.

12 Q Now I'm going to ask you about several.
13 Hasn't Riverdance been one of the really most
14 important pledge specials that the public television
15 stations have carried?

16 A Yes, it was a very successful program.

17 Q And it's repeatedly carried, isn't it?

18 A It was repeatedly carried in -- I think
19 the rights have since expired, but it was extensively
20 carried while its rights were --

21 Q During what years approximately?

22 A Gosh, I think it was --

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1 Q Last year?

2 A A year ago March I think was when
3 Riverdance came on.

4 Q And Riverdance is -- I don't know that
5 everybody's seen Riverdance.

6 Have you seen Riverdance?

7 A I have.

8 Q Would you tell us just briefly what it is?

9 A It's a stage presentation of Irish dancing
10 and folk music, and that's essentially the --

11 Q There was also -- I'm sorry.

12 There was also Lord of the Dance. That
13 was fairly successful too; maybe not as successful as
14 Riverdance?

15 A That is correct.

16 Q And that's a similar kind of program?

17 A I haven't seen that one, but I believe
18 it's similar, yes.

19 Q Now what about a show called Les Mis; was
20 that successful?

21 A Yes.

22 Q In fact, wasn't that one of the most

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1 successful fund raisers ever broadcast by the public
2 television industry?

3 A It was successful. I hesitate to say
4 whether it was the most or second most because I'm not
5 certain.

6 Q But it was in that dimension, first or
7 second or third?

8 A It was very successful.

9 Q What years was that shown?

10 A I believe that was two years ago in March,
11 but I'm not certain.

12 Q That's obviously a music content show.
13 It's based on the famous musical?

14 A Yes.

15 Q What about The Three Tenors; was that a
16 big fund raiser for the public television shows?

17 A That was very successful as a fund raiser,
18 yes.

19 Q That was also musical in content, wasn't
20 it?

21 A It was.

22 Q And then there was somebody that Mr. Day

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1 said he didn't know who it was, Yanni.

2 A Yes.

3 Q Who is Yanni?

4 A Yanni is a composer/conductor of I believe
5 what's called New Wave music.

6 Q Now --

7 A New Age, sorry.

8 Q And he has been successful -- I'll get to
9 him in a second -- as a fund raiser?

10 A Yes.

11 Q Current, on August 14th, 1997, said -- and
12 I'm not going to bother everybody with this if you
13 agree -- the biggest pledge acts of the 1990's were
14 The Three Tenors, Yanni, Les Misérables and
15 Riverdance.

16 Would you dispute that?

17 A I wouldn't dispute that.

18 Q And it also said, "Public TV viewers went
19 gonzo over Riverdance when the show debut'd last
20 December, 1996, generating an estimated \$11.5 million
21 dollars in pledges during the last fiscal year.
22 That's about 48 times what it cost to acquire the

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1 broadcast rights."

2 Would you dispute that?

3 A I don't have independent knowledge that
4 that's true, but neither would I dispute it. It's
5 probably --

6 MR. SCHAEFFER: I think maybe we better
7 mark this because there's some people from PBS --
8 would you put before the Arbitrators, with their
9 permission, Exhibit 519.9 and 10, which is an article
10 in Current of August 14, 1997? Make it 11X, yes.

11 (Whereupon, the above-mentioned
12 document was marked as ASCAP
13 Exhibit 11X for
14 identification.)

15 MR. RICH: Might this be a suitable moment
16 for a mid afternoon break, Your Honors?

17 CHAIRPERSON GRIFFITH: All right,
18 certainly.

19 (Whereupon, the foregoing matter went off
20 the record at 3:42 p.m. and went back on
21 the record at 3:57 p.m.)

22 BY MR. SCHAEFFER:

1 Q Before we get to 11X, a couple of
2 questions I did have. In conducting pledge drives,
3 the local Public Television stations pick themselves
4 the programs, do they not, that they put onto the
5 pledge drives? That isn't done for them by PBS?

6 A PBS supplies programs, but the stations
7 are free to use or not use these --

8 Q Now, are any or all of the pledge drive
9 programs produced by PBS?

10 A Are they produced by PBS?

11 Q Yes or bought by PBS for distribution, I
12 should say.

13 A As I said earlier, PBS doesn't produce
14 programs, but we do commission them or acquire them.

15 Q But there were also programs that are
16 sold, produced by other local television stations or
17 other sources of supply that become the basis for
18 pledge programs. Is that correct?

19 A That is correct.

20 Q Now, when we say that PBS acquires
21 programs for pledge drives, would that be part of what
22 I think we previously described as the national feed

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1 or the national program service or have I got that
2 confused?

3 A A little confused.

4 Q Okay. Why don't you tell me?

5 A That department at PBS that acquires
6 pledge programming is this SIP, or Station
7 Independence Program, Department. It acquires the
8 programs, turns them over, if you will, to the
9 Scheduling Department, who arranges for the
10 distribution of those programs to stations for their
11 use at times of their choosing.

12 Q Now let's go back to -- and we'll try and
13 do this fairly quickly because the hour is getting
14 late. You have in front of you ASCAP
15 Cross-Examination Exhibit 11. Do you know a gentleman
16 by the name of Abbott, John Abbott?

17 A First, is this the --

18 Q Yes, the one with the sort of German
19 soldier on it, female soldier on it.

20 A If you say so.

21 Q That's what she seems like to me. I don't
22 know.

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1 CHAIRPERSON GRIFFITH: It doesn't look
2 like that to me.

3 (Laughter.)

4 MR. SCHAEFFER: Have you seen Cabaret?

5 THE WITNESS: I do know John Abbott.

6 BY MR. SCHAEFFER:

7 Q And who is he?

8 A John is the Senior Vice President of
9 Development for PBS.

10 Q And he is quoted in this issue of Current
11 as saying, "Programs like Riverdance and Les
12 Misérables not only work wonders in recruiting new
13 members and bringing contributions from continuing
14 members. They also reaffirm for viewers why they
15 support Public TV." Do you think that's a fair
16 statement?

17 A Yes.

18 MR. SCHAEFFER: All right. I'm not going
19 to offer that in evidence.

20 BY MR. SCHAEFFER:

21 Q I'm next going to put in front of you --
22 well, let me see if I can --

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1 MR. SCHAEFFER: Would you put in front of
2 the witness a document from Public Broadcasting Report
3 dated March 21st, 1997? It's 712.15 and 16.

4 CHAIRPERSON GRIFFITH: That would be
5 March's ASCAP Exhibit 12X.

6 (Whereupon, the aforementioned
7 document was marked for
8 identification as ASCAP
9 Cross-Examination Exhibit Number
10 12X.)

11 JUDGE GULIN: This is a document in
12 dispute?

13 MR. SCHAEFFER: I believe so, yes.

14 BY MR. SCHAEFFER:

15 Q Would you read that to yourself for a
16 moment?

17 A (Perusing document.)

18 Q It is a fact, is it not, that PBS keeps
19 track of the total pledge results for the local
20 stations and releases that information from time to
21 time?

22 A Yes.

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1 Q How is that information gathered up?

2 A To the best of my -- it's not my
3 department. So I'm -- to the best of my knowledge,
4 stations are asked to -- we have a system-wide
5 communication system called PBS Express. And they're
6 asked to send us e-mails on PBS Express of their
7 results on a daily basis. Then those are tabulated.

8 Q And from time to time, I take it somebody
9 at PBS in Alexandria announces to the public what the
10 results of particular drives have been?

11 A Yes.

12 Q And are drives generally conducted certain
13 times of the year?

14 A Yes.

15 Q When are the drives conducted?

16 A March, August, and December.

17 Q Now, the first line of this article says,
18 "Public Broadcasters face daunting prospect of topping
19 last year's first ever \$50 million pledge drive, but
20 early numbers suggest that they just succeed."

21 In March of 1997, how close to the \$50
22 million did the Public Television stations come to?

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1 A I don't know.

2 Q Would there be records of PBS to that
3 effect?

4 A Yes.

5 Q Do you know just generally if it was close
6 to that, maybe not more, maybe not less, but within
7 that ballpark in '97?

8 A I really -- I honestly don't know. I
9 assume it was relatively close because if it had been
10 wildly greater or wildly below, I think I would have
11 heard about it, but --

12 Q You would have heard about it because you
13 would have been short money.

14 A Well, these funds don't come to PBS.
15 These are raised individually by stations.

16 Q But you would have heard from the local
17 stations that they were short money. Is that correct?

18 A That's a reasonable assumption.

19 Q And a number of programs are mentioned in
20 this. I'm just curious which one of them, if any --
21 a number of programs are mentioned in here. And I
22 just wanted to ask you a question or two to see if you

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12

Q You would have heard about it because 2/28/85Y

13 would have been short money.

14 A Well, these funds don't come to PBS.
15 These are raised individually by stations.

16 Q But you would have heard from the local
17 stations that they were short money. Is that correct?

18 A That's a reasonable assumption.

19 Q And a number of programs are mentioned in
20 this. I'm just curious which one of them, if any --
21 a number of programs are mentioned in here. And I
22 just wanted to ask you a question or two to see if you

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1 know what the source of those programs was.

2 For example, there's reference here to Les
3 Mis, which I take it was a real record-setter in
4 pledge drives?

5 A It was a very successful pledge program.

6 Q And was that a PBS-acquired show?

7 A It was commissioned by PBS through WNET
8 and was actually part of the Great Performances
9 series.

10 Q I see. You have here a reference to
11 Evening With Harry Belafonte and Friends. Was that a
12 PBS-acquired show?

13 A Well, you say I "have a reference." This
14 is --

15 Q I'm sorry. I mean the article refers to.

16 A Okay. Harry Belafonte was acquired by
17 PBS.

18 Q That was essentially a music show, I
19 assume?

20 A Yes.

Q Then the article refers to Lord of the

22 Dance, which we've already established was a musical

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1 show. Was that acquired by PBS for the local
2 stations?

3 A Yes.

4 Q Do you have any recollection of what it
5 costs to acquire Les Mis in Concert for --

6 A No.

7 Q Do you have any recollection about the
8 other programs: Harry Belafonte and Friends or Lord
9 of the Dance?

10 A I'm guessing it would be -- I would guess
11 somewhere in the range of 100 to 200 thousand.

12 Q Do you have any recollection, say, for
13 Harry Belafonte of how much that yielded in pledges
14 for the local television stations?

15 A I don't know.

16 Q Those numbers would be somewhere at PBS,
17 though, I assume?

18 A Again, we do collect the numbers. One
19 thing you have to be cautious of is the inference that
20 because somebody pledged at the end of that program,
21 that was the reason they pledged. They may be
22 pledging for other reasons as well.

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1 Q Right.

2 A We do collect --

3 Q But that was the occasion that was used?

4 A That's the occasion at which the pledge
5 occurred. This was pointed out by Abbott in that
6 earlier quote you read that it reminds people why they
7 like Public Television. And that may stimulate a
8 pledge. It has nothing to do with the program
9 necessarily.

10 MR. SCHAEFFER: Now, next I ask that what
11 was Exhibit 505.32 be marked as ASCAP's next
12 cross-examination exhibit, 13X.

13 CHAIRPERSON GRIFFITH: It will be marked as
14 Exhibit 13X.

15 (Whereupon, the aforementioned
16 document was marked for
17 identification as ASCAP
18 Cross-Examination Exhibit
19 Number 13X.)

20 MR. SCHAEFFER: Thank you.

21 JUDGE GULIN: And, to be clear, 12X
22 remains in evidence?

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1 MR. SHORE: 12X was in --

2 JUDGE GULIN: Remains in evidence. You're
3 not asking us to rule on the motion to strike at this
4 point?

5 MR. SCHAEFFER: That's right.

6 MR. SHORE: Correct.

7 MR. SCHAEFFER: Most of these I'm not
8 going beyond. This is really to refresh him with.

9 BY MR. SCHAEFFER:

10 Q Would you read 505.32, which is I guess 12
11 or 13, the document in front of you?

12 A (Perusing document.) All right.

13 Q In this article, Mr. Scalem, whom I think
14 you previously identified as the Vice President of
15 Fund-Raising or if not, I assume he is the Vice
16 President of Fund-Raising of PBS or was --

17 A Or was.

18 Q Was he that in 1997?

19 A Yes.

20 Q And apparently he said that the --
21 withdrawn.

22 Do you have any reason to dispute that

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1 \$30.5 had been raised during December 1996 by pledge
2 drives by Public Television?

3 A No.

4 Q Nor would you dispute Mr. Scalem's quoted
5 statement that "This is one of the largest increases
6 from one pledge period to another, from one year to
7 another that I've ever seen."

8 And he credited the lineup of
9 top-performing shows, which included Riverdance, Andre
10 Reiu, The Vienna I Love, and the American Master
11 Special: Danny Kaye, A Legacy of Laughter?

12 A Jim is a colleague of mine, but I do have
13 to point out this is a little self-serving.

14 Q Why do you say it's self-serving?

15 A Well, because Jim is the one who acquires
16 the programs.

17 Q I see.

18 A So while I don't dispute that, it is
19 natural for PBS to want to make sure that its stations
20 give PBS the credit for having done a splendid job.
21 And I believe we did so, but I feel compelled to just
22 point that out.

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1 Q I see. Well, you're not suggesting Mr.
2 Scalem would have gilded the lily or said something
3 that was not true?

4 A I certainly don't think he would have said
5 something that is not true.

6 Q Do you know what Andre Reiu, The Vienna I
7 Love, what kind of show that was?

8 A No. I'm sorry. I don't.

9 Q Did you ever see the Danny Kaye show?

10 A I did not.

11 Q I'm just going to move on to another
12 subject, but let me ask you something: Of the
13 existence of any of these pledge drives or the use of
14 music in these pledge drives mentioned anywhere in
15 your direct testimony?

16 A I don't believe so.

17 Q And so that was left out by you when you
18 testified?

19 A Yes.

20 Q "Yes" or "No"?

21 You have testified that Public
22 Television's programming expenditures have been held

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1 in check. "In a challenging economic environment in
2 which we are requiring our program producers to hold
3 the line on expenses, it ill-behooves the performing
4 rights organizations to seek significant fee increases
5 for one set of contributions to such programming."
6 Did you write that?

7 A I think I -- my testimony was a
8 combination of things I wrote and things that were
9 suggested and that I reviewed and edited. So I can't
10 tell you exactly whether I parsed that particular
11 sentence or not, but it is my testimony.

12 Q So it may not have been written by you?
13 It may have been written for you?

14 A It may have been.

15 Q Now, tell me about the process by which
16 your direct testimony was created. How did that work?
17 Without telling me the communications between you and
18 counsel, just what happened?

19 A Well, we met. I met with counsel. We
20 discussed the case and the issues. I made suggestions
21 about things I thought would, you know, advance our
22 point of view.

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1 Counsel assisted in the drafting of
2 testimony. I then reviewed it, edited it, moved some
3 things around. Through an iterative process, we came
4 up with the testimony that was eventually submitted.

5 Q How much time did you personally spend in
6 this process?

7 A Probably I'll say maybe 40 hours a week.

8 Q And I noticed that your testimony and Mr.
9 Jabelow's have a very similar organizational
10 structure. Both of them start off with the word
11 "Introduction," untitled.

12 The first section of yours is described at
13 Page 3, "An Overview of Public Television and its
14 Operations." Mr. Jabelow, who is on radio, of course,
15 says, "An Overview of Public Radio and its
16 Operations."

17 The subsection, then, on yours is "One
18 Mission of Public Television," Page 4. Mr. Jabelow's
19 is "Public Radio's Mission." You then have a title,
20 "PBS' Role in the Operation of Public Television."
21 Jabelow has "NPR's Role in the Operations of Public
22 Radio."

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1 You have "The Trends in Public
2 Television's Broadcasting Operations." He has "Trends
3 in Public Radio Programming." And he has another one
4 that's not comparable.

5 Can you account for this similarity?

6 A It seems like a logical structure, beyond
7 that, I can't help you, no.

8 Q Isn't it a fact that those captions were
9 put on the document for you?

10 A Yes.

11 MR. SCHAEFFER: Would you put before the
12 witness and the Panel Public Broadcasting's 1997
13 annual report? We've also got a color copy of one
14 page, which is very hard to read. It's Page 2.

15 And this would be 14X. And I will offer
16 this in evidence if it's not in already.

17 (Whereupon, the aforementioned
18 document was marked for
19 identification as ASCAP
20 Cross-Examination Exhibit
21 Number 14X.)

22 BY MR. SCHAEFFER:

1 Q Have you ever seen this document before,
2 Mr. Downey?

3 A Yes.

4 Q What is it?

5 A It's a PBS annual report.

6 Q I'm going to turn your attention to Page
7 11 of that report.

8 A Uh-huh.

9 Q And I'm going to direct your attention to
10 the next to the last paragraph on that page, where it
11 says "Last year." I assume that's 1996?

12 A Yes.

13 Q "PBS promised to strengthen the
14 centerpiece national program service, specifically to
15 increase its budget 50 percent by the year 2000
16 without significant increases in dues from member
17 stations. In the first year of PBS's station equity
18 model for program financing, investment in national
19 programming increased by 16 percent, or \$18 million."

20 Is that true?

21 A Yes.

22 Q And I'm also going to turn your attention

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1 to the second page of the document and ask you if the
2 following, which appears in the final report, is true
3 under "Financial Highlights." "The Public
4 Broadcasting Service, PBS, is developing new revenue
5 opportunities to generate earnings to enhance its
6 member services and to relieve local financial
7 pressures.

8 "PBS' services include a unique array of
9 noncommercial programming and related resources
10 delivered via the PBS-managed satellite system and the
11 internet as well as preschool to postgraduate
12 education services, the school, college library, and
13 at-home use.

14 "Fiscal Year 1997 operating revenue was up
15 by almost \$32 million over Fiscal Year 1996, due
16 largely to growth in PBS' learning venture activities,
17 such as PBS' The Business Channel, PBS' home video,
18 and the PBS' adult learning service.

19 "In addition, strategic media partners'
20 direct investment in programming added another \$15
21 million, for a total increase of \$47 million, or 23
22 percent. The net effect was an increase in

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1 investments in future programming of \$18 million, a 16
2 percent rise.

3 "Moreover, operating earnings were strong,
4 despite the mid-year loss of Telstar 401, the
5 satellite used to transmit PBS' programming to
6 membership."

7 Is that true?

8 A Uh-huh, yes.

9 MR. SCHAEFFER: I next ask that there be
10 put before the witness a document which appeared on
11 the PBS --

12 CHAIRPERSON GRIFFITH: Let me interrupt
13 you just a moment. You moved this into evidence?

14 MR. SCHAEFFER: I move that in evidence.
15 I'm sorry. Go ahead.

16 CHAIRPERSON GRIFFITH: Any objection?

17 MR. RICH: No objection.

18 CHAIRPERSON GRIFFITH: All right. It will
19 be received without objection.

20 (Whereupon, the aforementioned
21 document, having previously
22 been marked for identification

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1 as ASCAP Cross-Examination
2 Exhibit Number 14X, was
3 received in evidence.)

4 MR. SCHAEFFER: I next ask that a January
5 28th, 1998 be marked as 15X. And I will, Mr. Rich, be
6 offering this into evidence.

7 CHAIRPERSON GRIFFITH: It will be marked as
8 Exhibit 15X.

9 (Whereupon, the aforementioned
10 document was marked for
11 identification as ASCAP
12 Cross-Examination Exhibit
13 Number 15X.)

14 CHAIRPERSON GRIFFITH: All right?

15 MR. SCHAEFFER: Have you finished reading
16 it, everybody? I don't know. They haven't seen it
17 before.

18 BY MR. SCHAEFFER:

19 Q Have you ever seen this before?

20 A No.

21 Q I will for the Panel's benefit say we got
22 this from the PBS Web site. Let me ask you a few

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1 questions before I offer it in evidence. The headline
2 reads, "PBS Revenue Grows 20 Percent in Fiscal 1997,
3 PBS President Ervin Duggan Tells Annual Fall Planning
4 Meeting of Station Executives."

5 Is that true?

6 A I'll take it at face value. I don't --

7 Q Were you at that meeting?

8 A I was at that meeting, yes.

9 Q Do you recall Mr. Duggan saying that there
10 had been a very successful 1997 for PBS?

11 A There was a successful '97. I'm sorry.
12 I can't tell you of my own present knowledge that I
13 recall him mentioning this or not mentioning this.
14 I'm not disputing it. I just -- you asked me if I
15 recalled, and the answer is --

16 Q Of your own knowledge, isn't it true that
17 in 1997, PBS' revenue went up 20 percent?

18 A If that's what this --

19 Q That was 1996 that you're holding.

20 A No. I believe this is '97.

21 Q Oh, it is? Okay. Well, then --

22 A The revenues certainly have gone up. And

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1 I'll -- yes, probably about 20 percent.

2 Q And would you agree with the first
3 paragraph of this document that entrepreneurial
4 initiatives and alliances with media partners
5 contributed to a 20 percent jump?

6 A Well, they contributed, yes.

7 Q Would you just explain to us what the
8 entrepreneurial initiatives are that are described?

9 A Well, for example, contributing to this
10 increase were things like PBS home video, where we
11 acquire the rights to -- the home video rights to PBS
12 programs and then make them available as in-home video
13 and sell them at retail or through direct marketing
14 techniques.

15 And that contributes considerable revenue.
16 It also contributes considerable expense, but it
17 certainly has increased our revenues.

18 Q And I think what you've already testified,
19 that which appears in the third paragraph, mainly that
20 Fiscal 1997 was the first year of the four-year PBS
21 pledge to increase its core national program service
22 budget by 50 percent to 165 million in Fiscal Year

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1 2000 is correct?

2 A That's the objective, but that's different
3 from revenues. That's to increase the programming
4 budget. And these revenue figures are talking about
5 the entirety of the corporation, not just the national
6 program service.

7 Q And is this, as far as you know, Mr.
8 Duggan's opinion that "Fiscal 1997 was the year when
9 PBS and its member stations made real progress with
10 our strategy of growth. We are changing the economics
11 of Public Television with a whole new range of
12 services PBS stations provide to the American people"?

13 A There's a time and place for a certain
14 level of hyperbole. And I think this is one of those
15 when you're presenting an annual report to your
16 members.

17 Q You think this was hyperbole?

18 A I think he was trying to make the best
19 case he could for the achievements we accomplished.

20 Q Okay. Do you think it was hyperbole to
21 refer to as a banner year, as in the next paragraph?

22 A I'm willing to accept that there --

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1 Q That it was a banner year?

2 A Yes.

3 Q These projects, these entrepreneurial
4 initiatives and alliances, they all followed 1996,
5 didn't they?

6 A We undertook what's called the station
7 equity model as a way of identifying new sources of
8 revenue for programs, new sources of program funding
9 or additional sources of program funding because the
10 stations were simply unable to increase the amount
11 they supply to PBS for national programming.

12 And I think we have met our targets in
13 doing that. I think the figure here is 18 million in
14 the first year, which meant that the program budget
15 was increased from approximately 120 million to
16 approximately 140 million.

17 Q Now, one of the ways the station -- but
18 this is all really 1996 and following, isn't it? It's
19 been a change in the way --

20 A It's recent, yes.

21 Q Now, isn't it also true that PBS has
22 embarked on a new program with respect to creative

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1 rights or rights to the particular programs that
2 they're acquiring?

3 A It was our practice historically to obtain
4 only the broadcast rights. And it is -- as time has
5 changed, it has been our -- we have attempted to
6 acquire more than just the broadcast rights because
7 PBS distributes in more than just the broadcast media.

8 We obtain, as I said a moment, home video
9 rights, for example, or --

10 Q And then you sell them; right? You sell
11 the videos?

12 A We sell the videos; right.

13 Q And this is all part of an effort to make
14 PBS and, indeed, Public Broadcasting more
15 entrepreneurial, more able to stand on its own two
16 feet; isn't that correct, without government help or
17 with a minimum of government help?

18 A As I said a moment ago, in part, this was
19 -- in large part, this was to stop asking the stations
20 to continue to increase their support of PBS. It was
21 a way of providing them with more programming without
22 tasking them with larger assessments.

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1 Q And it was also a way, was it not, in
2 response to Congress' concern that PBS wasn't doing
3 enough for itself and that it should be more
4 entrepreneurial. Isn't that true?

5 A That's true.

6 MR. SCHAEFFER: Would you put before the
7 witness -- okay; we'll do it this way -- put before
8 the witness what was 515.6, which will be the next
9 ASCAP cross-examination.

10 CHAIRPERSON GRIFFITH: This will be
11 Exhibit 16X?

12 MR. SCHAEFFER: That is correct.

13 (Whereupon, the aforementioned
14 document was marked for
15 identification as ASCAP
16 Cross-Examination Exhibit
17 Number 16X.)

18 BY MR. SCHAEFFER:

19 Q Would you read that to yourself?

20 A (Perusing document.)

21 Q Mr. Downey, let me know when you're
22 through.

1 CHAIRPERSON GRIFFITH: All right.

2 MR. SCHAEFFER: Yes.

3 BY MR. SCHAEFFER:

4 Q This is an article, is it not, by somebody
5 named Steve Behrens in Current. Do you recognize it?

6 A Yes.

7 Q Do you know Steve Behrens?

8 A I do.

9 Q I'm just going to ask you a couple of
10 questions about this. At the last line, it says,
11 "And, as projected, PBS has added \$52 million to its
12 program spending this fiscal year without big
13 increases in station dues and despite lost revenues
14 from Telstar satellite failure."

15 Is that the same number that I previously
16 described as 16 percent, that 52 million, or is it
17 more?

18 A I don't know where this 52 million is
19 coming from or what it includes. It's much larger
20 than the amount by which the national program service
21 programming budget increased.

22 And so I suspect somehow it's gotten --

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1 Steve has gotten mixed up as between revenues and
2 where they're applied, but I can't help you with this
3 figure. I'm sorry.

4 Q Okay. It's unrecognizable to you?

5 A I don't recognize it.

6 Q Now, the beginning of this article starts
7 -- let's see if Behrens got this right -- "PBS is
8 giving high priority to four initiatives in coming
9 months, aiming to boost revenue from program rights
10 investments, start new satellite feeds for DTV, and
11 launch new educational products and services that
12 supplement TV, according to the network president,
13 Ervin Duggan."

14 Is that correct?

15 A That sounds about right.

16 Q So that many of these projects that you
17 were previously discussing under direct examination
18 from Mr. Rich were projects that were increasing the
19 revenue of the PBS. Isn't that correct?

20 A Yes.

21 Q Then it goes on to say, "Consolidating
22 gains from the station equity model, this week's

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1 meeting in Dallas, Duggan plans to announce big
2 increases in ancillary revenues from videocassettes
3 and toy sales as well as PBS' acquisitions of video
4 rights. Buying more rights from producers is
5 fulfilling the promise of the station equity model,
6 making stations investors, rather than renters of
7 programming."

8 And that is one of the major changes now
9 in PBS, isn't it? It is now an investor in program,
10 not just a renter, or is Mr. Duggan wrong?

11 A Well, Mr. Duggan is always right. Mr.
12 Behrens has got this a little garbled.

13 Q Okay.

14 A PBS pays license fees to producers for
15 programs. We have always done that. Going back not
16 very far, we typically had -- the license fee had to
17 basically equal the cost to produce the program
18 because there was nowhere else to -- no other way to
19 acquire it.

20 But historically, even though PBS did
21 that, the member stations who put up the money did not
22 get what I would call a fair return on their

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1 investment because the program ended up being the
2 property of the producer, who could go off and market
3 it or sell it to some third party and keep the
4 revenues.

5 Now, as long as that was all in the Public
6 Television family, one could argue that it didn't
7 matter. But, as our system needs to become larger,
8 more complicated, as commercial for-profit producers
9 have become involved, we have had to change the
10 relationship.

11 Secondly, as stations have had less money
12 to make available to PBS to acquire programs, we've
13 had to find new sources of revenue with which to
14 produce those programs.

15 And so we have changed the relationship
16 and have come to call the funds we put into programs
17 investments so as to make the point that we expect a
18 return on that investment beyond simply the right to
19 show the program on the air.

20 We might expect an income share from
21 whatever benefits flow from the producing of that
22 program. For example, we now receive income from the

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1 sale of toys and dolls stimulated by the television
2 program Barney or from Sesame Street. Some of that
3 revenue comes back to PBS.

4 If a program is sold overseas, we may be
5 the party selling it. And we may take a distribution
6 fee or somebody else may sell it and we'll get an
7 income share.

8 But the point of all of this is to put our
9 financial relationships with producers on a more
10 businesslike setting, businesslike footing. In
11 addition, the station equity model also is not so much
12 a difference in kind as degree. It's finding media
13 partners in whom we can -- with whom we can share the
14 cost of producing programs. We may exploit it in
15 certain markets, and the media partner may exploit it
16 in certain other markets. And so that's what this has
17 been all about.

18 Q Who are some of these other media
19 partners?

20 A Well, for example, we have an agreement
21 with the Readers Digest Association, for example, for
22 the production of programs. And under the terms of

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1 that agreement, Readers -- RDA, Readers Digest, will
2 put up the funding to produce the program.

3 The program is then given to PBS. PBS has
4 the right to distribute it on Public Television. And
5 we end up with domestic home video rights, but the
6 Readers Digest has certain domestic direct response
7 video rights, certain foreign broadcast rights. They
8 would have the right to publish underlying books,
9 books by the author of the program, what have you.

10 So between us and recognizing we each have
11 different strengths and weaknesses, we try to get the
12 best return on the investment of their funds in the
13 program.

14 Q You have similar arrangements with Disney,
15 don't you?

16 A No. The arrangement -- we have a relation
17 with Disney for one program: Bill Nye, the Science
18 Guy.

19 Q And what's that relationship?

20 A The program is owned by Disney. It's
21 distributed. It's broadcast on commercial stations on
22 the weekends and by Public TV stations during the week

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1 if I'm not mistaken. The program is owned by Disney,
2 but we have no other --

3 Q How about Time-Warner? Don't you have
4 some strategic partnerships with Time-Warner?

5 A We have a home video relationship with
6 Warner Home Video. And we have a separate
7 relationship with Warner Brothers Records.

8 Q What's that relationship?

9 A Which, the records?

10 Q Yes. We'll start with the records.

11 A We have an agreement with Warner Brothers
12 Records wherein they put up the cost to produce a
13 program and the cost to make a CD companion or sound
14 track recording.

15 PBS gets the rights to the program,
16 including the home video rights. Warner gets the
17 rights to the CD. To the extent that through the
18 sales of records, the -- Warner is able to recover its
19 initial investment, then PBS and Warner split whatever
20 additional revenues are earned.

21 Q And, incidentally, as Mr. Behrens maybe
22 got it wrong or not, Mr. Behrens in this article

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1 refers to foreign sales. What foreign sales does the
2 station equity model entail?

3 A At this stage, PBS would like at some
4 point in the future to expand its service
5 internationally. That has not been achieved to date.
6 And so the answer to the question is that we receive
7 an income share from foreign -- PBS has always
8 received income shares from foreign sales.

9 But, again, one of our objectives in the
10 station equity model is to actually undertake the
11 distribution ourselves.

12 Q Mr. Behrens goes on in this same article,
13 and I'd like you to confirm whether it was true or
14 not. He says, "Public TV were up three percent in
15 February," presumably 1997, "and five percent in
16 March, " also presumably 1997, "compared to the
17 previous year, while commercial network audiences
18 continued to erode."

19 Was that true?

20 A I won't dispute the article. I don't know
21 independently of this.

22 Q Well, do you know yourself what it's been

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1 like in the last year or two? Have commercial
2 networks gone down, PBS stayed the same or gone up?
3 Do you know?

4 A Certainly over --

5 Q On Public Television?

6 A Certainly over the last several years, the
7 network ratings have gone down. PBS' ratings have
8 remained pretty steady or constant.

9 MR. SCHAEFFER: Let me see if I can get
10 this. Would you put the 1997 annual report -- oh, you
11 did? Well, then let's go back to it.

12 BY MR. SCHAEFFER:

13 Q I'd like to take a look at 14X again,
14 which is the annual report for '97. And I'd like to
15 confirm -- and we're almost through I'm sure you'll be
16 glad to hear with some exception. I just want to
17 confirm and just bring together some of the issues
18 I've raised already.

19 This is a letter in the annual report from
20 Mr. Duggan and Mr. Campbell. Mr. Campbell I take it
21 is the Chairman of the Board?

22 A Yes.

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1 JUDGE GULIN: What page are you on?

2 MR. SCHAEFFER: I'm sorry. This is Page
3 -- it's hard to find the page. It's Page 7? The
4 fifth page in, Page 4 on the left. It reads, "Dear
5 Friend." It should be the third or fourth page in.

6 CHAIRPERSON GRIFFITH: Yes, fourth.

7 MR. SCHAEFFER: Yes. Okay.

8 BY MR. SCHAEFFER:

9 Q I just want to confirm the truth of some
10 of the things which I'm sure are true, but I just want
11 to confirm them. It says, "Dear Friend of PBS: Two
12 years ago, we," presumably PBS, "launched strategies
13 aimed at creating a new, more entrepreneurial PBS, a
14 modern media enterprise rededicated to advancing
15 education causes during citizenship in America by
16 supporting the work of our member stations."

17 Now, that refreshes your recollection, I
18 assume, that it was in 1995 that the station equity
19 model became a new departure for PBS?

20 A I think it was '96.

21 Q You think it was '96. I'll accept that.

22 Then it goes on to say two paragraphs or

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1 the third paragraph down, "In a year when the
2 commercial broadcast networks continued to experience
3 erosion of their audience share to niche programmers
4 on cable, PBS' prime time viewership held firm and
5 steady. Our daytime children's program garnered a
6 double-digit increase."

7 I take it that was true?

8 A Yes.

9 Q Then the next paragraph says, "In a
10 ruthlessly competitive media marketplace, where
11 commercial programs struggled to define a distinctive
12 brand identity by appealing to an ever narrowing slice
13 of the democratic pie, we are finding it possible to
14 succeed by reaching out to every audience segment and
15 extending our creativity into new services and new
16 media. We call it expanding the mind print at PBS."

17 I take it that's true?

18 A Yes.

19 Q Then the next paragraph says, "That
20 expansion comes from a new position of financial
21 strength. At then end of the fiscal year, our
22 revenues before underwriting and including strategic

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1 partnerships showed an increase of 23 percent, topping
2 our \$224 million target by \$23 million.

3 "We can take pride not only in the amount
4 of new income but in the sources from which it came,
5 strategic partnerships and growth in services, such as
6 PBS The Business Channel, or PBS adult learning
7 service, and PBS home video.

8 "Of the total PBS revenue, only 52 percent
9 came from station sources, down from 61 percent in
10 1996. This means that our member stations are getting
11 more for their money, as are the viewers they serve."

12 Then it goes on to say, "In our core
13 programming mission, PBS met its target toward
14 expanding investment and the national program service
15 50 percent by the year 2000 and did so without
16 significantly higher programming assessments on our
17 member stations. One result was a programming station
18 that garnered more Peabody awards and children's
19 daytime Emmies than NBC, CBS, ABC, and Fox combined.

20 "And in a year when the broadcast news
21 became struggling to meet the new Federal
22 Communications Commission requirement of airing a mere

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1 three hours per week of education or informational
2 children's programming, PBS delivered seven and a half
3 hours of acclaimed curriculum-based educational
4 program weekly."

5 That's all true, isn't it?

6 A Yes.

7 Q Finally, I'm trying to summarize what I
8 believe are accomplishments of which PBS is proudest.
9 And I'm going to ask you whether or not these are
10 true.

11 "In 1996, PBS management implemented a new
12 strategic plan deigned to maximize entrepreneurial
13 efforts and bring increased resources to the backbone
14 of our enterprise, the national program service.

15 "This plan, called the station equity
16 model, included aggressive goals to achieve a 50
17 percent increase in the programming budget over 4
18 years following 3 years of flat funding.

19 "As a result, PBS' operating revenues at
20 the end of Fiscal '97 had grown by almost \$47 million
21 over Fiscal '96 and \$60 million over Fiscal '95, a 32
22 percent increase in 2 years.

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1 "PBS' dramatically improved financial
2 performance was a direct result of these new
3 entrepreneurial initiatives and is unprecedented in
4 the history of PBS."

5 That's true, isn't it?

6 MR. RICH: May we learn, Your Honor, what
7 Mr. Schaeffer is reading from so the witness can have
8 the same benefit?

9 MR. SCHAEFFER: Yes. It's a letter to
10 Congress dated February 13th, 1998 from PBS.

11 MR. RICH: Might the witness see it?

12 MR. SCHAEFFER: I'll be glad to let the
13 witness see it, and I'm glad to introduce it in
14 evidence. Let's mark this 17X, and I offer it in
15 evidence -- 16X. It's a letter from PBS to the
16 Congress. It's 17. Sorry.

17 (Whereupon, the aforementioned
18 document was marked for
19 identification as ASCAP
20 Cross-Examination Exhibit
21 Number 17X.)

22 MR. RICH: We have no objection to this.

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1 CHAIRPERSON GRIFFITH: All right. It will
2 be received without objection.

3 (Whereupon, the aforementioned
4 document, having previously
5 been marked for identification
6 as ASCAP Cross-Examination
7 Exhibit Number 17X, was
8 received in evidence.)

9 CHAIRPERSON GRIFFITH: While the witness
10 is looking that over, Mr. Schaeffer --

11 MR. SCHAEFFER: This is my last --

12 CHAIRPERSON GRIFFITH: Yes. You asked to
13 introduce Exhibit 15X, did you?

14 MR. SCHAEFFER: Yes, and I offer it in
15 evidence.

16 CHAIRPERSON GRIFFITH: Was there any
17 objection to that, Mr. Rich?

18 MR. RICH: No objection.

19 CHAIRPERSON GRIFFITH: All right. It will
20 be received as well.

21 (Whereupon, the aforementioned
22 document, having previously

1 been marked for identification
2 as ASCAP Cross-Examination
3 Exhibit Number 15X, was
4 received in evidence.)

5 MR. SCHAEFFER: I'm reading it anyway. Do
6 you want me to just cite the sections. I would just
7 as soon -- why don't I go -- you've got it in front of
8 you, and I've got a couple of questions about the
9 document. We probably can move more quickly.

10 BY MR. SCHAEFFER:

11 Q Is it also true that in 1996, as you
12 reported to Congress, PBS management began to
13 revolutionize its business practices with regard to
14 the acquisition of program rights?

15 JUDGE GULIN: Excuse me. Mr. Schaeffer,
16 where are you reading from?

17 MR. SCHAEFFER: Page 2, the bottom
18 paragraph.

19 CHAIRPERSON GRIFFITH: Was the first
20 question answered?

21 MR. SCHAEFFER: Yes.

22 THE WITNESS: No.

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1 MR. SCHAEFFER: No?

2 THE WITNESS: I don't believe it was.

3 MR. SCHAEFFER: Okay. I'm sorry.

4 BY MR. SCHAEFFER:

5 Q Then was what I read to you about in the
6 first paragraph correct?

7 A I don't think it is, actually, or at least
8 there's an inferred nexus between the station equity
9 model and these figures of 47 million and 60 million,
10 which may not be quite accurate.

11 My point here is that the station equity
12 model has to do with the national program service.
13 And, really, it is most directly related to the reason
14 we're here today, the programs that our stations
15 broadcast.

16 PBS engages in other activities that have
17 nothing to do with the programs that stations
18 broadcast, which contribute to our revenues and to
19 these numbers you see here; for example, again, home
20 video or things like the adult learning service, which
21 has a non-broadcast component, or things like other
22 kinds of cable or direct broadcast satellite services.

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1 Maybe that does bear on your interests.

2 All of these have sort of gotten washed
3 together here.

4 Q This is a letter that was written to
5 Congress to justify the giving of bonuses to certain
6 officers of PBS, including you. Isn't that correct?

7 A Yes, that's correct.

8 Q And are you telling me that some of this
9 is inaccurate?

10 A Well, I think the data are all accurate.
11 I think, however, linking -- you see the sentence that
12 reads "As a result, PBS' operating revenues at the end
13 of '97 had grown by 47 million over '96 and 60 million
14 over '95."

15 That is a true statement, but I'm a little
16 troubled by linking that narrowly to the station
17 equity model.

18 Q Is this the first time you've ever seen
19 this letter?

20 A No. I've seen this letter before.

21 Q Did you ever point out to anybody that
22 this letter to Congress wasn't accurate or was

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1 misleading?

2 A I only focused my attention this minute
3 when you --

4 Q Well, let's look at the second paragraph.
5 I'm not going to bother reading it out loud because
6 everybody can read it themselves. Is that inaccurate
7 also?

8 A I haven't read the second one fully.

9 Q Well, why don't you read it?

10 MR. RICH: Which is it? May I ask which
11 the second paragraph --

12 CHAIRPERSON GRIFFITH: You're on Page 2?

13 MR. SCHAEFFER: The second bullet on Page
14 2 now that we found out the first bullet is
15 inaccurate.

16 MR. RICH: Objection.

17 CHAIRPERSON GRIFFITH: The objection is
18 sustained. Stricken from the record.

19 BY MR. SCHAEFFER:

20 Q Is that accurate?

21 A Yes.

22 Q Let me skip now to because the letter is

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1 going to be in evidence now and the Arbitrators can
2 read it for themselves and I'm about to conclude the
3 last bullet point on Page 3, "PBS' future is directly
4 tied to its programming vision and the successful
5 execution of that vision.

6 "Our national programming enjoyed
7 extraordinary successes in 1997, during which PBS
8 introduced new and innovative programs. Among these
9 programs were Ken Burn's Thomas Jefferson, TR, The
10 Living End, and Arthur. These and many other programs
11 that were added last year garnered extraordinary
12 critical acclaim and an unusual number of awards."

13 That's all true, isn't it?

14 A Yes.

15 Q Now, all of these were offered to show
16 that the officers of PBS were entitled to an
17 extraordinary bonus in 1997. Isn't that correct?

18 A I think that was the point of this.

19 Q Where did the funds for that bonus come
20 from?

21 A From PBS' general funds.

22 MR. SCHAEFFER: No further questions.

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1 CHAIRPERSON GRIFFITH: All right. Thank
2 you.

3 Let me just inquire. Mr. Kleinberg, are
4 you going to have cross-examination?

5 MR. KLEINBERG: Yes, I will.

6 CHAIRPERSON GRIFFITH: All right. Mr.
7 Rich, are you going --

8 MR. RICH: I'll have some redirect, I
9 suspect.

10 CHAIRPERSON GRIFFITH: Redirect?

11 MR. RICH: It's been a very long day for
12 the witness, too, I believe, at this point.

13 CHAIRPERSON GRIFFITH: Tomorrow morning?

14 MR. SCHAEFFER: Fine with us.

15 MR. KLEINBERG: I'm perfectly happy to do
16 that because I feel some break would allow me to
17 condense, rather than to --

18 CHAIRPERSON GRIFFITH: All right. 9:30 or
19 10:00?

20 MR. RICH: What's the Panel's purpose?

21 CHAIRPERSON GRIFFITH: Which do you all
22 prefer?

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1 MR. KLEINBERG: Whatever is convenient for
2 the witness an the Panel.

3 CHAIRPERSON GRIFFITH: Mr. Downey, which
4 is more convenient for you, sir?

5 THE WITNESS: Actually, 10:00 would be a
6 little easier if that's all right.

7 CHAIRPERSON GRIFFITH: All right. We'll
8 recess until 10:00 o'clock tomorrow morning. Mr.
9 Downey, you're excused until 10:00 tomorrow morning.

10 (Whereupon, the witness was temporarily
11 excused.)

12 (Whereupon, the foregoing matter went off
13 the record at 4:58 p.m. and went back on
14 the record at 4:59 p.m.)

15 MR. KLEINBERG: Since this is the first
16 time we have a witness that carries over, I'm
17 inquiring as to what the Panel's practice is with
18 respect to the witness' consultation with counsel
19 while he's still in the middle of cross-examination.

20 My usual understanding in most places is
21 that while still on cross, that consultation should
22 not occur, but I thought I'd raise it since we haven't

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1 had that problem in the course of the proceedings to
2 date.

3 JUDGE GULIN: Well, we haven't had any
4 witnesses carried over.

5 MR. KLEINBERG: That's what I'm saying.

6 JUDGE GULIN: We had breaks, though.

7 MR. SCHAEFFER: I've always -- I'm sorry.

8 JUDGE GULIN: I have to make inquiry again
9 whether you conferred with your witnesses during the
10 break.

11 MR. SCHAEFFER: I have refrained from
12 doing so and instructed everybody on my team not to do
13 so.

14 MR. KLEINBERG: That's my understanding if
15 I --

16 CHAIRPERSON GRIFFITH: Do you have any
17 trouble with that, Mr. Rich?

18 MR. RICH: We have followed the same
19 practice.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. RICH: I had not contemplated,
22 however, we have not followed that practice with

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1 respect to redirect examination, where counsel has
2 conferred with their clients but --

3 MR. SCHAEFFER: Yes. I think that's --

4 MR. RICH: And I would ask both Mr.
5 Kleinberg and Mr. Schaeffer -- I've got probably half
6 a dozen areas from your examination that I might want
7 to speak to this witness about overnight if that's not
8 a problem.

9 MR. KLEINBERG: I don't have any problem
10 with the differentiation between after the cross is
11 completed and the beginning of the redirect.

12 CHAIRPERSON GRIFFITH: Mr. Downey, what
13 we're saying is that you're not to confer with counsel
14 until the cross-examination of you is completed. And
15 you'll be able to confer with counsel, if necessary,
16 before the beginning of redirect. Agreed?

17 MR. SCHAEFFER: That's our understanding,
18 Your Honor.

19 MR. KLEINBERG: Thank you, Your Honor.

20 (Whereupon, the foregoing matter was
21 recessed at 5:00 p.m., to be reconvened
22 on Tuesday, March 31, 1998 at 10:00 a.m.)

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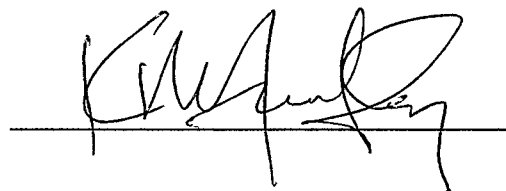
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Place: Washington, DC

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A handwritten signature in black ink, appearing to be "K. M. [unclear]", is written over a horizontal line.